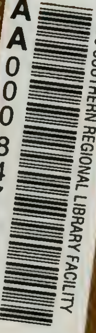
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A TREATISE

ON THE

LAW OF BILLS AND NOTES,

CHECKS,

INCLUDING THE TEXT OF THE NEGOTIABLE INSTRUMENTS LAW OF NEW YORK, CONNECTICUT, COLORADO, FLORIDA, VIRGINIA, MARYLAND, AND THE DISTRICT OF COLUMBIA.

BY

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ST. LOUIS:
THE F. H. THOMAS LAW BOOK CO.
1898.

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1898

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PREFACE.

In the preparation of this treatise, the author has had in mind the needs of law schools, rather than those of the Bench and Bar in the active practice of the profession; although it is believed, that the practicing lawyer will find as much aid from its use as he can from any other work, on the same subject of the same size.

The writer has, recently, in the introduction to his Cases on Real Property, explained his views on methods of legal education, in which the main idea is the combination of *exposition*, by the use of a carefully prepared text, setting forth the principles of the law; and *illustration*, by the study of a few selected cases. The Cases on Real Property were prepared to be used with the author's treatise on the same subject; and in the present instance, the selected cases are appended to the succeeding chapters, whose subjects they are intended to illustrate, and incorporated in the one volume. It is believed that this feature will commend itself to a large number of teachers.

The citations of authorities are numerous, considering the size and purpose of the volume; they are largely recent decisions, and include decisions filed in 1897. For the convenience of schools having small libraries, to the official citation has been added the reference to the American Decisions, American Reports, and the volumes of the Reporter System.

In the appendix will be found the recent New York Negotiable Instruments Law, which, with the exception of three sections, has been adopted in the additional States of Connecticut, Florida, Colorado, Virginia, Maryland, and the District of Columbia; recommended for adoption in Massachusetts, Rhode Island and South Carolina, and which, it is expected, will ultimately be substantially

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adopted by all the States; in conformity with the recommendation by the conference of the State Commissioners on uniform State Laws.

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THE LAW OF BILLS AND NOTES, CHECKS.

CHAPTER I.

GENERAL CHARACTERISTICS OF BILLS AND NOTES.

SECTION 1. What is money.
2. Commercial paper defined.
3. Bills of exchange — Foreign and inland bills.
4. Forms of bills of exchange.
5. The effect of a bill — When does it operate as an equitable assignment.
6. Promissory notes defined.
7. Form of a promissory note.

§ 1. **What is money.**— Money may be defined to be "any material that by agreement serves as a common medium of exchange and measure of value in trade." [1] In the early days of every nation, trade took the form of barter, *i. e.*, one thing which A. had to sell and B. wanted to buy, would be exchanged for another which B. wanted to sell, and A. wanted to buy, the quantities of the two things thereby exchanged being determined by the parties themselves, according to their estimates of the relative values of the commodities. As a certain commodity came into general demand, it finally became a measure of value for other commodities, and when its quantity was definitely determined by the stamp of the

[1] Standard Dictionary.

government, it assumed the characteristics of money as we now know it. Instead of barter or exchange of goods in general, A. would sell B. what he had to sell for a certain quantity of the commodity called money, and he would buy from B. or any one else what he wanted, paying for it some of the money which he had acquired by his sale of his own goods.

Various things of intrinsic value were used at different times as money; but finally gold, silver and copper became the common materials of money, and this is the universal practice of the present day.[1]

The most striking characteristic of money is its currency, its easy circulation from hand to hand for whatever it is worth. It has always been the rule of law in England and in this country, that the purchaser of a chattel, of a horse or a cow, could acquire no better title to it, than what his vendor possessed. And if the vendor's title was defective for any reason, because he had stolen or appropriated what belonged to another, the good faith of the vendee and his ignorance of the wrongful appropriation would not furnish him with any defense to the real owner's action of trover or replevin.[2]

On the other hand, it is probably the law in all civilized communities that money is not subject to this rule. If one misappropriates money belonging to another, and transfers it for value to a third person, who receives it in good faith and without knowledge of the true ownership, the third person acquires an absolute title to it against even the true owner. The true owner can only recover it of those who receive it with actual or constructive notice of the defect of title or without consideration.

[1] It may be advisable to state that there is no intention here to dispute the proposition that United States Treasury notes are properly described as money. As to which, see *infra*, § 22.

[2] See Tiedeman on Sales, Chapter XXI., and in particular §§ 310–316. There was an exception to this rule recognized by the English law, in the case of goods sold in the open market or fair. But this exception does not exist in the United States, and the rule above stated is universally enforced. Tiedeman on Sales, § 311.

§ 2. **Commercial paper defined.**— As the demands of commerce for the medium of exchange increased, the actual transfer of money in payment of debts, particularly where the transactions arose between parties living in distant places, became inconvenient, and finally, on account of the limited quantity of money in existence, absolutely impossible. As a substitute for money, certain obligations of individuals to pay money were transferred in payment of debts. These obligations are now known as commercial paper. Commercial paper may therefore be defined to include all those instruments of indebtedness which are treated and used, in the commerce of the world, as the equivalents or representatives of money, or which are given the characteristics of money in the furtherance of commercial ends. In the course of time and of the development of international commerce, a great many other kinds of commercial paper have been invented and adopted by the commercial world, to which the distinctive characteristics of money have been more or less given; such as coupon bonds, certificates of deposit, bills of lading, receivers' certificates, government warrants, and the like;[1] but inasmuch as this book is prepared for the use of students in law schools, the only kinds of commercial paper which will be discussed and explained here, are bills of exchange, promissory notes, and checks. Inasmuch as checks are a species of bills of exchange, with material modifications, the book is called a treatise on Bills and Notes.

§ 3. **Bills of exchange — Foreign and inland bills.**— A bill of exchange is an unconditional written order by one person on another, directing him to pay to a third person or to his order, or to the bearer, the sum of money therein named. He who draws the bill is called the *drawer*; the person on whom it is drawn, the *drawee*, and the one in whose favor it is drawn, or to whom or to whose order the money is to be paid, the *payee*. Until the drawee agrees to *honor* or pay the bill, he is under no

[1] All of which are treated of in Tiedeman's Commercial Paper.

obligation to the payee or holder. But when he accepts it, he binds himself to pay the sum of money called for by the bill.[1]

The bill of exchange was first employed in the settlement of international debts, by merchants living in different countries; but they were afterwards used as well in domestic transactions. There are, however, important differences between *foreign* and *inland bills*. A bill of exchange is said to be *foreign*, when it is drawn in one country and made payable in another. It is an *inland bill*, when it is both drawn and made payable in the same country. A bill is not foreign because parties to the bill reside in different countries, where it is drawn and made payable in the same country. The residences of the parties do not control the character of the bill.[2]

Formerly *foreign* and *inland* bills differed from each other in many other particulars; but there are but two important differences which need be mentioned in this connection. *First*, where a bill is *foreign*, its interpretation and construction is governed by the law of the place where it is to be paid, instead of the law of the place of its execution. An *inland bill*, being payable in the place where it was drawn, no conflict of laws can arise, and its construction and interpretation is always governed by the law of the place where it is drawn. *Secondly*, for reasons given elsewhere,[3] it is necessary to protest a foreign bill of exchange for non-payment, in order to hold the drawer and indorsers liable, but this is not true of inland bills; and, as long as local statutes have not modified the law merchant, protest is of no legal value in the case of inland bills.

[1] See *post*, chapter on Acceptance.

[2] Scudder *v.* Union Nat. Bank, 91 U. S. 406. It must be remembered, however, that where the drawee does not reside in the place, where the bill is drawn, the bill is presumed to be payable in the domicile or place of business of the drawee, unless some other place of payment is agreed upon. See Grimshaw *v.* Bender, 6 Mass. 157, and *post*, chapter on Presentment for Payment.

[3] See *post*, chapter on Protest.

In determining what are foreign bills of exchange, Ireland was held to be foreign to England; so that a bill drawn in England and payable in Ireland, was held to be a foreign bill of exchange.[1] The same rule was laid down generally by the courts in this country, in respect to the States and Territories, which compose the United States. A bill drawn in New York, and payable in Illinois, is a foreign bill.[2]

If a bill purports on its face to be a foreign bill, no private agreement as to payment in the place where the bill was drawn will change it to an inland bill, as against subsequent parties without notice.[3] If the bill does not show this fact, either by statement of the place of payment or residence or address of the drawee, its character may be established by evidence *aliunde*, and in the absence of such evidence, it will be presumed to be an inland bill.[4]

It does not often happen that the inland bill is issued in duplicate: but in order to avoid the inconvenience and delay which may be occasioned by the loss of a foreign bill, it is a common custom, particularly in bills drawn on Europe and other distant countries, for the drawer to issue several copies of the bill, which are called a *set of exchange*, and together constitute one bill. Either copy of the bill may be negotiated, and when any one of them is accepted and paid, all the others are extinguished, even against *bona fide* purchasers, so far as the drawer is concerned, although the payee is liable to each person, to whom he has transferred a copy of the bill.[5] The drawee should accept only one of the copies, and pay the amount of the bill, when the part which he has ac-

[1] Mahoney *v.* Ashlin, 2 B. & Ad. 378.

[2] Buckner *v.* Finley, 2 Pet. 586; Phoenix Bank *v.* Hussey, 12 Pick. 483; Commercial Bank *v.* Varnum, 49 N. Y. 269.

[3] See Towne *v.* Rice, 122 Mass. 67.

[4] Kearney *v.* King, 2 B. & Ald. 301; Riggin *v.* Collier, 6 Mo. 568; Yale *v.* Ward, 30 Tex. 17.

[5] Lang *v.* Smyth, 7 Bing. (20 Eng. C. L. Rep.) 284; Holdsworth *v.* Hunter, 10 B. & C. 449; Walsh *v.* Blatchley, 6 Wis. 423 (70 Am. Dec. 469.)

cepted is presented for payment. If he accepts more than one copy, he will be liable to *bona fide* purchasers on as many copies on which he has written acceptance.[1] But any copy may be presented for acceptance, and the drawee may accept any copy.

§ 4. **Forms of bills of exchange.**— The following is the form of an ordinary bill of exchange, showing the acceptance written across the face: —

NEW YORK CITY,
Nov. 4, 1896.

$500.

Ten days after date pay to the order of John Doe the sum of five hundred dollars, and charge the same to the account of

RICHARD ROE.

To JOHN JACKSON,
CHICAGO, ILL.

Accepted
Nov. 7, 1896.
JOHN JACKSON.

The day of payment may be varied, as a bill may be made payable *on demand*, *at sight*, at a given date in the future, or at a certain number of days or months *after sight*, *after demand*. When it is a foreign bill, in addition to what appears in the form above given, it reads: "pay my first exchange, the second and third remaining unpaid," or "pay my second exchange, the first and third remaining unpaid," etc.

§ 5. **The effect of a bill of exchange — When does it operate as an equitable assignment.** — When a bill is accepted, as is fully set forth elsewhere,[2] the acceptor becomes absolutely liable on the bill, irrespective of the financial obligations existing between him and the drawer. But generally, where one person draws a bill of exchange on another, to the order of a third, the drawee has funds belonging to the drawer, or he is indebted to the drawer, in an amount sufficient to cover the sum of money called

[1] Holdsworth *v.* Hunter, 10 B. & C. 449; Davison *v.* Robertson, 3 Dow. 218; Wright *v.* McFall, 8 La. Ann. 120.

[2] See *post*, chapter on Acceptance.

for by the bill, and the bill is received by the payee, more or less in reliance upon this supposed fact. When the drawee has accepted the bill, it does not matter to the payee or holder, whether this supposed fact exists or not. But if the drawee refuses to accept and the drawer becomes insolvent, it may often occur that the only effective remedy of the payee of the bill would be to claim the right to the funds or obligation against which the bill was drawn, to the exclusion of the general creditors of the drawer. But in order that this end may be attained, it is necessary to show that a bill of exchange operates as an assignment *pro tanto* of the fund or debt, against which it was drawn. It is impossible to set forth here the full argument *pro* and *con* of this proposition of the law.[1] It is only possible here to state that the only case in which it is at all possible for the bill of exchange to operate as an assignment, is where the bill calls for the payment of the entire fund or debt against which it is drawn. If the bill calls for the payment of a part of the fund, it cannot be treated as giving to the payee any claim against the fund or debt due to the drawer, either as a legal or equitable assignment *pro tanto*.[2] But the cases are not united even in support of that proposition; very many cases holding, that in order that a bill may operate as an equitable assignment, it must be drawn on a particular fund.[3] At best, this theory of an equitable assignment, when applied to bills of exchange, is not favorably considered by the English and American courts. It is somewhat more favorably considered in its application to checks.[4]

§ 6. **Promissory note defined.**— A promissory note is an unconditional promise to pay to another's order, or to bearer, a stated sum of money at a specified or implied time. The person who executes the note is called the

[1] It is to be found in Tiedeman on Commercial Paper, §§ 5–5c.
[2] Nimocks *v.* Woody, 97 N. C. 1; Roberts *v.* Austin, 26 Iowa, 315.
[3] Bull *v.* Tuttle, 81 N. Y. 454; Loyd *v.* McCaffrey, 46 Pa. St. 410.
[4] See *post*, § 176, and Tiedeman's Commercial Paper, § 452.

maker, and he to whom it is made payable is called the *payee*. Although promissory notes were not used as commercial paper at as early a day as foreign bills of exchange were brought into general use, they did come into general use along with inland bills of exchange. On their first introduction into general use, the application to them of the distinguishing characteristics of money was strenuously resisted by the English courts. And it is even a doubt now, whether, independently of statute, a promissory note has the qualities of negotiable paper. But this has been made an academic question, almost devoid of practical value, by the very general statutory enactment, ascribing to notes the same character of negotiability as was given by the common law merchant to bills of exchange. The claim is made, that when a note is indorsed it differs from an accepted bill of exchange in no other respect than that, in the indorsed note, the promise to pay precedes in point of time the order to pay; while in the accepted bill, the order precedes the promise.[1]

§ 7. **Form of a promissory note.**— The following is the form of an ordinary promissory note:—

$500. NEW YORK CITY, Nov. 4, 1896.

Three months from date, I promise to pay to John Doe or order, the sum of five hundred dollars, with interest from date at the rate of six *per cent* per annum.

RICHARD DOE.

The time of payment may, of course, as in the case of the bill of exchange, be provided for in other terms, and the stipulation for interest may be left out. In the succeeding chapter, the requisites and component parts of bills and notes are fully set forth and explained; and the form above given is only illustrative of the general form of promissory notes.

[1] Bowers *v.* Industrial Bank of Chicago, 58 Ill. App. 498. For a fuller explanation of this question, see Tiedeman on Commercial Paper, § 6.

Sometimes instruments are executed in ambiguous forms, so that it is more or less difficult for one to determine, whether a note or some other legal instrument was intended to be executed. Of course, the intention of the parties must be determined, and be given effect, when it is ascertained. Thus, where an instrument written in the ordinary form of a promissory note, except that in the left-hand corner, at the bottom, the name and address of a third person is given, and this third person has written an acceptance across the face of the paper, it was held that, the intention of the parties being ambiguous, the payee or holder may treat the instrument either as a note or as an accepted bill.[1] And where a paper is executed, in the form of a promissory note, promising to pay the payee, after the maker's death, a sum of money in satisfaction of money advanced or services rendered, either to maker or a third person, it is a promissory note and not a testamentary disposition.[2]

[1] Edis *v.* Bury, 6 Barn & Cres. 433.

[2] Hegeman *v.* Moon, 131 N. Y. 462; 30 N. E. 487; Wolfe *v.* Wilsey, 2 Ind. App. 549.

CHAPTER II.

THE REQUISITES AND COMPONENT PARTS OF BILLS AND NOTES.

SECTION 7. The date.
8. Ante-dating and post-dating.
9. Name of drawer or maker.
10. Joint and several notes.
11. Two or more drawers.
12. Liability of one or more joint makers or drawers, as sureties.
13. The name of the drawee.
14. The name of the payee.
15. Fictitious or non-existing parties.
16. Same person as different parties.
17. Words of negotiability.
18. A distinct obligation to pay.
19. Time of payment.
20. Payment must be unconditional.
21. Certainty as to amount of payment.
22. Payment in money only.
23. The place of payment.
24. Acknowledgment of consideration.
25. Sealed instruments not negotiable.
26. Delivery.
27. Delivery as an escrow.
28. Delivery of bills and notes executed in blank.

§ 7. **The date.**—It is customary for a bill or note to be dated; and where such bill or note is made at a certain time after date, it would seem to be essential that the date be given on the paper. But it is very generally held, that in no case is the statement of the date in the bill or note absolutely necessary to its validity or negotiability. Where the date is not given, it is the day of the issue; and this may be shown by parol evidence, and the day of maturity be computed from the proven day of issue. If the day of delivery cannot be proven, the maturity may be computed from the earliest day on which the bill or note is proven to have been in the possession of the payee or subsequent

holder.[1] Where a note or bill is negotiated without date, the payee or holder is impliedly authorized to insert the real date; and while, as between the maker and himself, he cannot insert any other but the real date or day of delivery; if he does put in a different date, whether it accelerates or postpones the time of payment, it will bind the maker, after it has passed into the hands of a *bona fide* holder.[2] Any mistake in the date may be proven by parol evidence, as against every one but a *bona fide* holder; and it may be corrected in an equitable action for the reformation of the instrument.[3] The date is usually written in the upper right-hand corner of the bill or note; but it will be good if it appears anywhere else.[4]

§ 8. **Ante-dating and post-dating.** — It is not uncommon for a bill or note to be ante-dated or post-dated, in order to accelerate or postpone the time of payment. And in such a case the time of payment is always to be computed from the stated date. Such a practice does not invalidate the instrument; nor is there any ground for suspicion if the instrument has been negotiated before the given date.[5] The validity of a bill or note is determined by the actual day of delivery or negotiation, and not by the given date. So, where, through the act of ante-dating or post-dating,

[1] Clark *v.* Sigourney, 17 Conn. 511; Hill *v.* Dunham, 7 Gray, 543 (27 Am. Rep. 70); Cowing *v.* Altman, 71 N. Y. 435; Collins *v.* Driscoll, 69 Cal. 550 (11 P. 244); Seldonridge *v.* Connable, 32 Ind. 375; Dean *v.* De Lezardi, 24 Miss. 424; King *v.* Fleming, 72 Ill. 21 (22 Am. Rep. 131).

[2] Androscoggin Bank *v.* Kimball, 10 Cush. 373; Goodman *v.* Simonds, 19 Mo. 106; Page *v.* Morrell, 3 Keyes, 417; 3 Abb. App. Dec. 433; 33 How. Pr. 244; Michigan Bank *v.* Eldred, 9 Wall. 544; Maxwell *v.* Van Sant, 46 Ill. 58.

[3] Huston *v.* Young, 33 Me. 85; Cranson *v.* Goss, 107 Mass. 439; 9 Am. Rep. 45; Paysant *v.* Ware, 1 Ala. 160; Almich *v.* Downey, 45 Minn. 460 (48 N. W. 574); Germania Bank *v.* Distler, 4 Hun, 633; Buck *v.* Steffey, 65 Ind. 58; Knox *v.* Clifford, 38 Wis. 651 (20 Am. Rep. 28); Greathead *v.* Walton, 40 Conn. 226.

[4] Sheppard *v.* Graves, 14 How. 505.

[5] McSparran *v.* Neely, 91 Pa. St. 17; Luce *v.* Shoff, 70 Ind. 152; Burn *v.* Kahn, 47 Mo. App. 215; Collins *v.* Driscoll, 69 Cal. 550 (11 P. 244); Frazier *v.* Trow Printing Co., 24 Hun, 281 (checks).

the instrument is made to appear to have been negotiated at a time when the parties were unable, through death, infancy or insanity, or through the prohibition of the law to make contracts on that day (Sunday laws), to execute a valid obligation; it may be shown by parol evidence, when the instrument was actually delivered or negotiated. On the other hand, if this practice is resorted to, in order to make a bill or note appear to be valid, by concealing the actual day of delivery, parol evidence is equally admissible to show the actual day of delivery and the consequent invalidity of the instrument.[1]

§ 9. **Name of drawer or maker.**—Inasmuch as a bill or note, to be negotiable, requires that every essential element to the obligation must be definitely stated in the instrument; not only must the name of the drawer of a bill, or of the maker of a note, appear in the instrument, but it must so appear as to cause no uncertainty as to who is the drawer or maker. For this reason, it is held that the negotiability of an instrument is destroyed where it is signed by two persons in the alternative.[2] It is, however, a question of considerable doubt, whether the absence of the drawer's signature from a bill is cured by the acceptance of the drawee. The better opinion is that the acceptance does not give validity to the bill, as long as the drawer's signature is not added.[3] It must be remembered, however, that, where a bill or note is negotiated without the signature of a necessary party, the payee or holder has the implied authority

[1] Bayley *v.* Taber, 5 Mass. 286; Aldridge *v.* Branch Bank, 17 Ala. 45; Cranson *v.* Goss, 107 Mass. 439 (9 Am. Rep. 45); King *v.* Fleming, 72 Ill. 21 (22 Am. Rep. 131).

[2] Ferris *v.* Bond, 4 Barn. & Ald. 679. In this case, the note read: "I, J. C., promise, etc ," and was signed, "J. C. or H. B." If the "or" had been omitted, this would have been a joint and several note, H. B. signing in the character of a surety.

[3] Tevis *v.* Young, 1 Met. (Ky.) 197. Suit was brought on the acceptance by the holder of an unsigned bill, and it was held that the suit would not lie. The same conclusion was reached by the English and other American courts in McCall *v.* Taylor, 19 C. B. (N. S.) 301; May *v.* Miller, 27 Ala. 515; Knight *v.* Hurlbert, 74 Ill. 133.

to add the needed signature.[1] While it is customary and advisable for the name of the drawer or maker to be written in full, this is not necessary to the validity of the bill or note. The signature may be made in any way, which would enable the drawer or maker to be identified; and as long as identification is possible, any signature of the bill or note will be a sufficient proof of the intention to execute it. Initials would answer,[2] and an assumed or fictitious name will suffice, provided the real party can be identified.[3] It is not even necessary for the names, real or assumed, of the parties to be written in the paper. Other means of description may be used in the execution. A note or bill would, doubtless, be valid and binding if signed "The heirs of A. B.," and it has been held that a note signed "Steamboat Ben Lee and owners" was properly executed.[4] Where the signature takes the form of a mark, proof of the intention to make the mark as a signature must be made; but attestation of the mark by witnesses is not necessary to its validity.[5] The signature, as well as the body of the instrument, may be written in ink or pencil, and be equally valid.[6] So, also, may the signature be affixed by means of a

[1] Harvey *v.* Cane, 34 L. T. R. 64; Moiese *v.* Knapp, 30 Ga. 942; Tevis *v.* Young, 1 Met. (Ky.) 197; Whitmore *v.* Nickerson, 125 Mass. 496 (28 Am. Rep. 257).

[2] Merchants' Bank *v.* Spicer, 6 Wend. 443; Weston *v.* Myers, 33 Ill. 424; Bank of Lassen Co. *v.* Sherer, 108 Cal. 513 (41 P. 415), misspelling of the Christian name.

[3] Stony Island Hotel Co. *v.* Johnson, 57 Ill. App. 608; Melledge *v.* Boston Iron Co., 5 Cush. 158 (51 Am. Dec. 59); Bartlett *v.* Tucker, 104 Mass. 336 (6 Am. Rep. 240). The use by a *genuine party* of an *assumed name* must not be confounded with the addition to the paper of the name of a *fictitious party*. As to which see *post*, § 15.

[4] Sanders *v.* Anderson, 21 Mo. 402. See to same effect May *v.* Hewett, 33 Ala. 161.

[5] Willoughby *v.* Moulton, 47 N. H. 205; Brown *v.* Butchers' Bank, 6 Hill, 443 (41 Am. Dec. 755); Chadwell's Adm'r *v.* Chadwell, 98 Ky. 643 (33 S. W. 1118); Handyside *v.* Cameron, 21 Ill. 588 (74 Am. Dec. 119); Flowers *v.* Bitting, 45 Ala. 448 (by statute the name of the maker or drawer is required to be written alongside of the mark, in order to be valid).

[6] Brown *v.* Butchers' Bank, 6 Hill, 443 (41 Am. Dec. 755); Reed *v.* Roark, 14 Tex. 329 (65 Am. Dec. 127).

stamp.[1] A printed signature is also sufficient, provided the printed signature can be shown to have been adopted by the maker or drawer as his signature in execution of the bill or note.[2]

The signature of the drawer or maker is customarily *subscribed*, *i. e.*, written at the end of the bill or note, in the right-hand corner. But the location of the signature is a matter of no importance, except that, where it does not appear in its customary place, the burden is on the holder to show that the signature, appearing elsewhere, was written with the intention of executing the bill or note. Where that intention is proven, a note is properly signed, where it reads, "I, A. B., promise to pay," etc.[3] Of course, if the statute of a State in reference to bills and notes, requires subscription as necessary to their validity, the signature must be placed at the bottom.

§ 10. **Joint and several notes.**— A note may be signed by two or more makers, and the character of their liability will be determined according as the note is held to be a joint note, or a joint and several note. If it is a joint note, and the common law has not been changed by statute, all the makers must be sued together. They cannot be sued separately. If it is a joint or several note, the holder may sue all together, or he may bring separate actions against each one of the makers. But he cannot sue in the same action more than one and less than all. He must sue all or only one of them. Modern statutory procedure now generally, throughout the United States, authorizes the maintenance of an action against any number of joint obligors, more than one and less than all, whatever may have been the character of the obligation at the common law. The

[1] Bennett *v.* Brumfitt, L. R. 3 C. P. 28.

[2] Brown *v.* Butchers' Bank, 6 Hill, 443 (41 Am. Dec. 755); Schneider *v.* Norris, 2 M. & S. 286; Pennington *v.* Baehr, 48 Cal. 565; Weston *v.* Myers, 33 Ill. 424.

[3] Clason *v.* Bailey, 14 Johns. 484; Saunderson *v.* Jackson, 2 Bos. & P. 238; Schmidt *v.* Schmaelter, 45 Mo. 502; Palmer *v.* Grant, 4 Conn. 389; Rodocanachi *v.* Butterick, 125 Mass. 134; Nat. Pemberton Bk. *v.* Longee, 108 Mass. 371 (11 Am. Rep. 367).

distinction between *joint* notes and *joint and several* notes, has been practically abolished everywhere.[1]

§ 11. **Two or more drawers.**— A bill may be executed by two or more drawers, whether they sign individually or as partners. Where they sign as partners, there is in reality but one drawer, the partnership.[2] But where they sign individually, they are joint and several obligors, each being individually liable *in solido* to the holder and to the drawee, if the latter accepts the bill.[3]

§ 12. **Liability of one or more joint makers or drawers as sureties.**— As is more fully explained in a subsequent chapter,[4] a surety is one who guarantees the due performance of an obligation, by becoming a regular party to a bill or note. Where nothing appears on the bill or note to show that one of the makers or drawers has signed as surety, such co-maker or co-drawer sustains, as to all subsequent *bona fide* holders, the same liability as does the principal debtor. But if he writes the word "surety" at the end of the name, he gives notice to all subsequent holders, that he is a surety; and if there is any defense available, growing out of his character as a surety, it will prevail against such holder. But in the absence of any such defense, he is liable to the holder; and, in the case of a bill, to the acceptor, to the same extent as the principal debtor.[5] But, as between themselves, in determining their mutual rights, and particularly in ascertaining their right of contribution from each other; where one of them has paid the note or bill in full, it is always permissible to show that one of them had signed as a surety.[6]

[1] For cases illustrating this distinction, see Tiedeman on Commercial Paper, § 13, and works on Contracts generally.

[2] See *post*, Chapter IV., on Partners.

[3] Suydam *v.* Westfall, 4 Hill, 211; 2 Denio, 205.

[4] See *post*, chapter on Sureties and Guarantors.

[5] Suydam *v.* Westfall, 4 Hill, 211; 2 Denio, 205; Benedict *v.* Cox, 52 Vt. 247; Sprigg *v.* Bank of Mount Pleasant, 10 Pet. 264; Summerhill *v.* Tapp, 52 Ala. 227; Jackson *v.* Wood, 108 Ala. 312 (19 So. 312).

[6] Hubbard *v.* Gurney, 64 N. Y. 457; Holt *v.* Bodey, 18 Pa. St. 214; McGee *v.* Prouty, 9 Met. 547 (43 Am. Dec. 409).

§ 13. **The name of the drawee.**— A bill is incomplete, if the name and address of the drawee are not given in the instrument, and it is customary for them to be written in the left-hand corner of the face of the bill at the bottom. But the place is not at all essential, provided it can be ascertained on whom the bill was drawn. It has been held that the name of the drawee need not be inserted in the bill, provided that he could be ascertained from the address given in the bill, where the bill was payable.[1] The drawee may also be described by his business relations, instead of by name; and it will be a sufficient address, if he can thereby be identified.[2]

If the bill does not indicate in any of these ways on whom it is drawn, and to whom presentment for acceptance and for payment is to be made, the bill is not valid. If, however, such a bill is actually accepted by some one, he is estopped from denying that he was the drawee.[3] It has been held in Illinois that an instrument in the form of a bill, without any designation of a drawer, is to be treated, either as the promissory note of the drawee, or a bill of exchange drawn on himself.[4]

There may be two or more drawees, and each must accept individually in order to be bound, if they are not partners. It is, however, not necessary for all of them to accept. The acceptance of one, or any number less than all of the drawees, will bind those who accept, and the bill may be negotiated without the acceptance of the others.[5] Sometimes, too, a bill is drawn on two drawees, in the alternative, as, for example: "to A., or in case of need, to B." In such a case, the acceptance by the first pre-

[1] Gray *v.* Milner, 8 Taunt. 739. In this case the bill read "payable at No. 1 Wilmot street, opposite the Lamb, Bethnal Green, London." See also Cork *v.* Bacon, 45 Wis. 192 (30 Am. Rep. 712).

[2] As where the bill was drawn on "The Steamer Dorrance and owners. Ala. Coal & Mining Co. *v.* Brainard, 35 Ala. 476.

[3] Wheeler *v.* Webster, 1 E. D. Smith, 1; Walton *v.* Williams, 44 Ala. 347; Watrous *v.* Holbrook, 39 Tex. 572.

[4] Funk *v.* Babbitt, 156 Ill. 408; 41 N. E. 166.

[5] Mountstephen *v.* Brooke, 1 Barn. & Ald. 224. But see 563.

cludes acceptance by the other. But before there can be protest for non-acceptance, the bill must be presented to both or all, if there be more than two drawees.[1] Inasmuch as the drawee does not assume any liability on a bill, until he accepts, this address of the bill to two persons in the alternative does not in any way violate the rule of negotiable paper, requiring certainty as to the parties to the bill. The acceptance by one of these drawees supplies the required certainty of parties.

§ 14. **Name of the payee.**— In order that a negotiable bill or note may be valid, the payee must be defined in the instrument with reasonable certainty. If the instrument does not, even in the most general terms, indicate a payee, although the real party in interest can maintain suit against the maker or drawer on the original consideration, the holder of the bill or note cannot sue on the instrument, at least as a negotiable bill or note.[2] It is not, however, necessary for the payee to be described by name. A bill or note, payable to *bearer*, is generally held to be negotiable, without any other description of the particular payee, the holder of the paper being held in every such case to be the presumptive payee.[3] So, also, may a note or bill be made payable to the "Heirs of A." [4]

The payee's name may appear in the acknowledgment of the receipt of the consideration, as where the paper reads: "Received of John Doe one hundred dollars, which I promise to pay on demand." [5]

[1] Anon., 12 Mod. 447; Tiedeman Com. Paper, § 16; *post*, § 63.

[2] Prewitt *v.* Chapman, 6 Ala. 86; Hoyt *v.* Lynch, 2 Sandf. 328; Bacon *v.* Fitch, 1 Root, 181; Adams *v.* King, 16 Ill. 169 (61 Am. Dec. 64). Thus a note was held to be good, but non-negotiable, where "you" was the only designation of the payee, the real payee being shown by parol evidence. Kinney *v.* Flynn, 2 R. I. 329; Shackleford *v.* Hooker, 54 Miss. 716.

[3] Rich *v.* Starbuck, 51 Ind. 87; Hathcock *v.* Owen, 44 Miss. 799; United States *v.* White, 2 Hill, 59 (37 Am. Dec. 374).

[4] Bacon *v.* Fitch, 1 Root, 181; Cox *v.* Beltzhoover, 11 Mo. 142 (47 Am. Dec. 145).

[5] Green *v.* Davies, 4 B. & C. 235; Maze *v.* Heinze, 53 Ill. App. 503; Cummings *v.* Gassett, 19 Vt. 308.

A bill or note may be made payable to two payees in the alternative, and it may be sued on, at least in a joint action by the payees; but such a provision would destroy the negotiability of the instrument.[1] And this rule has been carried to the extreme of holding that a note, payable "to Olive Fletcher or R. H. Oakes, administrators of Winslow Fletcher, deceased" was not negotiable, although the law authorizes one of two or more personal representatives to receive payment of a note payable to the decedent's estate.[2]

Where a note or bill is made payable to two or more payees, all must join in the indorsement, in order to make an effective transfer. But payment may be made to either for the benefit of all.[3] Their interests are presumed to be co-equal.[4]

Where the payee's name is left out, and a blank space for the insertion of his name is unfilled, the holder is impliedly authorized to insert the name.[5]

§ 15. **Fictitious or non-existing parties.** — It is not an uncommon practice, in order to give a bill or note a fictitious value, for fictitious persons to be named as payees and indorsees, and for the real payee to make indorsements for these fictitious parties. The English rule was, that where the introduction of fictitious parties is done with the knowledge of the maker of the note or the acceptor of a bill, he can be held liable on such an instrument in an action by a *bona fide* holder, as if it were payable to bearer; but that he is not liable, if he was ignorant of the use of fictitious parties.[6] And this distinction, based upon

[1] Parker *v.* Carson, 64 N. C. 563; Blanckenhagen *v.* Blundell, 2 B. & Ald. 417; Walrad *v.* Petrie, 4 Wend. 576; Spaulding *v.* Evans, 2 McLean, 139; Carpenter *v.* Farnsworth, 106 Mass. 561 (8 Am. Rep. 360).

[2] Musselman *v.* Oakes, 19 Ill. 81 (68 Am. Dec. 583); Carr *v.* Bauer, 61 Ill. App. 504.

[3] Ryhiner *v.* Feickert, 92 Ill. 305 (34 Am. Rep. 130).

[4] Tisdale *v.* Maxwell, 58 Ala. 40.

[5] First Nat. Bank *v.* Johnson, 97 Ala 655 (11 So. 690).

[6] Tatlock *v.* Harris, 3 T. R. 174; Collis *v.* Emmett, 1 H. Bl. 313.

the ignorance or knowledge of the primary obligor of the fictitious character of the payee or indorsee, has been followed by many of the courts in this country, particularly in the case of a bank, on which a check is drawn payable to a fictitious payee.[1] In England, by the act of 1882, the acceptor of a bill or maker of a note, made payable, or indorsed to fictitious parties, is liable thereon as if it were originally made payable to bearer, whether he knew of the fictitious character of the parties or not.[2] But the right to treat the paper as payable to bearer is limited to *bona fide* holders. One, who takes the paper with knowledge of the fictitious character of some of the parties, cannot maintain an action against the maker or acceptor in any case.[3]

§ 16. **Same person as different parties.**— In order that commercial paper may be negotiated without indorsement and the consequent liability of indorsers, and yet avoid the commercial discredit of an indorsement "without recourse;" it has become quite common for bills and notes to be made payable to the order of the drawer or maker, so that the named payee is the same person as the drawer or maker. The drawer or maker then indorses it in blank, and it is then transferred, as if it had been made payable to bearer. Of course, two parties, distinct and separate, are as necessary to the negotiation of a bill or note, as they are to the making of any other contract. For this reason, it was once held that a bill or note, in which the drawer or

[1] Armstrong *v.* Pomeroy Nat. Bank, 46 Ohio St. 512 (22 N. E. 866); Ch.sm *v.* First Nat. Bank of N. Y., 96 Tenn. 641; 36 S. W. 387; Farnsworth *v.* Drake, 11 Ind. 101; Shipman *v.* Bank of the State of New York, 126 N. Y. 318 (27 N. E. 371) (latter case rests upon provision of the N. Y. Rev. Statutes). For a fuller discussion, see Tiedeman Com. Paper, § 19.

[2] Clutton *v.* Attenborough, 2 Q. B. 707; Vagliano *v.* Bank of England, L. R. 16 App. Cas. 107. See also to that effect, Lane *v.* Krekle, 22 Iowa, 399; Ort *v.* Fowler, 31 Kan. 478 (47 Am. Rep. 501).

[3] Hunter *v.* Jeffery, Peake Add. Cas. 146. It would seem, however, that such a holder, if he were not actually guilty of participation in a fraud, could recover the consideration in an action for money had and received. Foster *v.* Shattuck, 2 N. H. 446.

maker was the named payee, was invalid.[1] But the prevailing rule is, that while it is an impossibility for a valid bill or note to be created in that manner, as long as it is not transferred to some other person, because there has been no delivery, and consequently not a complete contract; as soon as it has been indorsed and transferred to a purchaser, there are two distinct separate parties in contractual relation to each other, and the paper may be sued on, as if originally payable to bearer.[2]

The drawer may draw upon himself, and likewise make the bill payable to his own order, so that, when indorsed by him in blank, and delivered to another person, a good negotiable instrument will have been executed. Inasmuch, however, as the drawer and drawee are the same persons, the holder may at his option treat the paper as a bill of exchange or promissory note, and in neither case is presentment for acceptance necessary.[3]

§ 17. **Words of negotiability.**— When bills of exchange first came into use, *choses in action* were in general non-assignable at the common law; and in order that the intention of the parties, to make the bill assignable and negotiable, may be shown, it became the custom to make it in express terms payable to the payee *or order*, or *bearer*. So, also, when promissory notes were by the Statute of Anne declared to be negotiable like bills of exchange, the notes which would fall within the statute were described as containing these or similar words of negotiability. It has in consequence become the universal opinion that, without these words of negotiability, a bill or note, or any other

[1] Flight *v.* MacLean, 16 M. & W. 51.

[2] Lovejoy *v.* Spafford, 93 U. S. 430; Roby *v.* Phelon, 118 Mass. 541; Com. *v.* Dallinger, 118 Mass. 439; Irving Bank *v.* Alley, 79 N. Y. 536; Main *v.* Hilton, 54 Cal. 110; Pickering *v.* Cording, 92 Ind. 306 (47 Am. Rep. 145); Miller *v.* Weeks, 22 Pa. St. 89; Kayser *v.* Hall, 85 Ill. 51 (28 Am. Rep. 628). This is now the generally accepted doctrine everywhere in this country and in England. For fuller citations of authorities see Tiedeman Com. Paper, § 20.

[3] Lovejoy *v.* Spafford, 93 U. S. 430; Planters' Bank *v.* Evans, 36 Tex. 592; Cunningham *v.* Wardwell, 12 Me. 466.

species of commercial paper, will not be negotiable, and the holder takes the instrument subject to all the defenses, which might be set up against the original payee.[1] While the original purpose of these words was to show the maker's or drawer's consent to the transfer of the paper to others, so as to pass legal title, they now survive the repeal of the common law prohibition of the assignment of *choses in action*, as evidence of an intention to give to the paper the characteristics of negotiability. The paper is assignable without these words, but the assignee does not have the protection of *bona fide* ownership against defenses to the paper, which do not appear on its face.[2]

While the words, *or order*, *or bearer*, are generally employed, neither is necessary; any words will be sufficient, which indicate the obligor's consent to the transfer of the paper. Thus "holder" and "assigns" are good equivalents, and the use of them will make the bill or note negotiable.[3]

It seems, however, that, where the paper contains an express declaration that it is negotiable, the use of any of these words of negotiability may be dispensed with, without destroying the negotiability of the paper.[4] Where a bill or note is made payable *to the order of A.*, it has the same effect as when it reads "to A. or order."[5]

[1] Words of negotiability not necessary in some of the States. Searles *v.* Seipp, 6 S. D. 472 (61 N. W. 804); Haines *v.* Nance, 52 Ill. App. 406 (Rev. Stat. Ill., ch. 98, § 3); National Bank *v.* Leonard, 91 Ga. 805 (18 S. E. 32).

[2] Bank of Sherman *v.* Apperson, 4 Fed. Rep. 25; United States *v.* White, 2 Hill, 59 (37 Am. Dec. 374); Sibley *v.* Phelps, 6 Cush. 172; Warren *v.* Scott, 32 Iowa, 22; Sinclair *v.* Johnson, 85 Ind. 527. See Tiedeman Com. Paper, § 21, for a fuller statement.

[3] Putnam *v.* Crymes, 1 McMull. 9 (36 Am. Dec. 250); Wilson Co. *v.* National Bank, 103 U. S. 770; Dutchess Co. Ins. Co. *v.* Hachfield, 1 Hun, 675 (coupon bond to "———, his executors, administrators and assigns). But see, *contra*, as to "collector," Noxon *v.* Smith, 127 Mass. 485.

[4] Raymond *v.* Middleton, 29 Pa. St. 529, 530; and see Cudahy Packing Co. *v.* Sioux Nat. Bank, 75 Fed. 473; 21 C. C. A. 428.

[5] Smith *v.* McClure, 5 East, 476; Wittey *v.* Mich. Mut. L. I. Co., 123 Ind. 411 (24 N. E. 141); Howard *v.* Palmer, 64 Me. 86; Stevens *v.* Gregg, 89 Ky. 461 (12 S. W. 775); Huling *v.* Hugg, 1 Watts & S. 419.

And where a note is made payable to bearer, it is not necessary to its negotiability to name any particular person as payee.[1] But it is not negotiable, if it is made payable *to the bearer A.*, as the word *bearer* in that connection only describes A. and is not intended as a word of negotiability.[2]

§ 18. **A distinct obligation to pay.**— In order to make a bill or note negotiable, it must contain a distinct obligation to pay; the bill must contain a certain order or command to the drawee to pay, while the note must contain a certain promise to pay. If, however, the instrument shows the intention to pay a certain sum of money, it will be a good promissory note, although there may not be a distinct promise to pay.[3] And the omission of the personal pronoun, "I" or "we" will not affect the negotiability of an otherwise properly executed note.[4] Where, in a bill, in accordance with the custom of commercial courtesy, the phrase used is "please pay," it is no less a command or order, and does not destroy the negotiability of the bill.[5] But where the entire phraseology indicates that the payment by the person, to whom the note is addressed, is requested as a favor and not a right, the courts have held that the paper is not a negotiable bill of exchange.[6] But where words of negotiability are inserted in the paper, the

[1] Cobb *v.* Duke, 36 Miss. 60 (72 Am. Dec. 157); Tescher *v.* Merea, 118 Ind. 586 (21 N. E. 316); Bullard *v.* Bell, 1 Mason, 252.

[2] Weaver *v.* Scott, 32 Iowa, 22. See Halbert *v.* Ellwood, 1 Kan. App. 95 (41 P. 67).

[3] Central Trust Co. *v.* N. Y. Equipment Co., 74 Hun, 405 (31 Abb. N. C. 121); Hammett *v.* Brown, 44 S. C. 397 (22 S. E. 482); Brooks *v.* Brady, 53 Ill. App. 155; Beardsley *v.* Webber (Mich.), 62 N. W. 173.

[4] Brown *v.* First Nat. Bank, 115 Ind. 572 (18 N. E. 56); Lesser *v.* Scholze, 93 Ala. 338 (9 So. 539).

[5] Jarvis *v.* Wilson, 46 Conn. 90 (33 Am. Rep. 18); Ruff *v.* Webb, 1 Esp. 129 (Mr. N. will much oblige Mr. W. by paying Mr. Ruff or order); Wheatley *v.* Strobe, 12 Cal. 92 (73 Am. Dec. 522).

[6] Gillilan *v.* Myers, 31 Ill. 525; Knowlton *v.* Cooley, 102 Mass. 233. Thus, "Mr. Little, please to let bearer have £7, and place it to my account and you will much oblige your humble servant." Little *v.* Slackford, 1 Mood. & M. 171.

paper is generally held to be a negotiable bill, notwithstanding the dubious phrases of request.[1]

Although the word "pay" is customarily employed, it is not necessary. Any equivalent, such as "deliver" will be sufficient.[2]

Whether a mere due bill, which generally contains only an acknowledgment of a debt, is to be treated as a negotiable note, is doubtful. Some of the American cases follow the English rule, that a mere naked due bill, without words of negotiability, is not a promissory note in any sense.[3] And certainly, without words of negotiability, the due bill is nowhere considered a negotiable note. But where words of negotiability are employed, and the due bill satisfies all the other requirements of negotiable paper as to certainty of time of payment and amount of indebtedness, it is commonly held to be a negotiable promissory note, notwithstanding the absence of a distinct promise to pay.[4]

§ 19. **Time of payment.**— In conformity with the general requirement of certainty as to all the terms of the negotiable instrument, the bill or note must indicate, either expressly or by implication, the time of its payment. Bills and notes are usually made payable at a certain.date, or at a stated time *after date*, *after sight*, or *after demand*, or they are made payable *on demand* or *at sight*. But this is not absolutely necessary; other words of similar import may be used. So, also, when no time of payment is speci-

[1] Ruff *v.* Webb, 1 Esp. 129, cited *supra;* Messmore *v.* Morrison, 172 Pa. St. 300 (34 A. 45).

[2] Lovell *v.* Hill, 6 C. & P. 238; Cummings *v.* Gassett, 19 Vt. 308; Schmitz *v.* Hawkeye Gold Mining Co. (S. D.), 67 N. W. 618. See Furber *v.* Caverly, 42 N. H. 74.

[3] Gay *v.* Rooke, 151 Mass. 115 (23 N. E. 835; Olson *v.* Peterson, 50 Ill. App. 327; Currier *v.* Lockwood, 40 Conn. 349 (16 Am. Rep. 40); Hotchkiss *v.* Moskey, 48 N. Y. 478.

[4] Hussey *v.* Winslow, 59 Me. 170 (good to bearer); Cummings *v.* Freeman, 2 Humph. 144; Gray *v.* Bowden, 23 Pick. 282; Brady *v.* Chandler, 31 Mo. 28; Jacquin *v.* Warren, 40 Ill. 459; Franklin *v.* March, 6 N. H. 364 (25 Am. Dec. 462) (good to —— or order); Bacon *v.* Bicknell, 17 Wis. 523.

fied in the instrument, it will be presumed to be payable on demand.[1]

When the word *month* is used in the statement of the time of payment, a calendar month is presumed to have been intended; and so likewise will a calendar year be presumed, where the word *year* is used.[2]

§ 20. **Payment must be unconditional.**— It is also a requisite of commercial paper that it must be payable absolutely, and at all events. If the payment is made to be dependent upon any contingent event, the instrument ceases to be negotiable. In order to be negotiable, the payment must be unconditional.[3] But to make a paper

[1] Porter *v.* Porter, 51 Me. 376; Bacon *v.* Page, 1 Conn. 404; Tucker *v.* Tucker, 119 Mass. 79; Thompson *v.* Ketcham, 8 Johns. 190 (5 Am. Dec. 332); Gaylord *v.* VanLoan, 15 Wend. 308; Jones *v.* Brown, 11 Ohio St. 601; Hall *v.* Toby, 110 Pa. St. 318 (1 A. 369); First Nat. Bank *v.* Price, 52 Iowa, 570 (3 N. W. 69); Meador *v.* Dollar Sav. Bank, 56 Ga. 605. And it has been held that a note reading "   months after date," the number of months being left blank, was payable on demand. McLean *v.* Nichen, 3 Vict. Rep. 107. But see Wainwright *v.* Straw, 15 Vt. 215 (40 Am. Dec. 675). On the other hand, a note reading "90   after date" was presumed to be payable ninety *days* after date, in absence of proof to the contrary. Weems *v.* Parker, 60 Ill. App. 167.

[2] For calculation of the day of maturity, see *post,* chapter on Presentment for Payment.

[3] For examples, see the following cases in which the conditional character of the promise to pay was held to destroy the negotiability of the bill or note: White *v.* Cushing, 88 Me. 339; 34 A. 164 (order on Savings Bank, which requires that the bank book shall accompany the order); Post *v.* Kinzua Hemlock R. R. Co., 171 Pa. St. 615 (33 A. 362) ("for rental of rolling stock under contract of lease and conditional sale"); Sawyer *v.* Child, 68 Vt. 360 (35 A. 84); Chandler *v.* Carey, 64 Mich. 237 (31 N. W. 309) (on the completion of certain work); Coolidge *v.* Ruggles, 15 Mass. 387 (provided a certain ship shall arrive); Harris *v.* Lewis, 5 W. Va. 575 (payable a certain time after " ratification of peace," made in the Southern States during the Civil War); Cushing *v.* Fifield, 70 Me. 50 (35 Am. Rep 293) (subject to a certain contract or policy); Pearson *v.* Garrett, 4 Mod. 242 (when a particular person shall marry); Kelley *v.* Hemmingway, 13 Ill. 604 (66 Am. Dec. 474) (when the maker shall become of age); Costello *v.* Crowell, 127 Mass. 293 (34 Am. Rep. 367) (given as collateral security with agreement); Kingsbury v. Wall, 68 Ill. 311 (on delivery of a deed); Van Zandt *v.* Hopkins, 151 Ill. 248 (37 N. E. 845) (on delivery of stock); Shaver *v.* West. Un. Tel. Co., 57 N. Y. 459 ("if not revoked and the

non-negotiable the condition must be inserted in the bill or note, and not put into some separate collateral agreement.[1]

The illustrations, given in the preceding note, show conditions which may or may not happen. Where, however, the conditions, imposed upon the obligation to pay, are certain to happen, or their performance is clearly within the power of the payee or holder, and the conditions are reasonable; the conditional character of the obligation to pay does not destroy the negotiability of the bill or note. It is impossible in a treatise, designed for use in law schools, to give full and complete illustrations. The cases given in the note will probably suffice to explain the principle of the distinction between the effect on the negotiability of the paper of conditions, which are reasonable and sure to happen, and of those which are uncertain of occurrence.[2]

The more frequent source of contention over negotiability of promissory notes and bills of exchange, on account of the conditional character of the promise to pay, arises from stipulations, which make the time of payment uncertain. Generally, the same test determines the effect of the stipulation on the negotiable character of the paper, viz.: if the stipulation only makes the time of payment uncertain, and

payee continues in employ of the maker"); Shackleford *v.* Hooker, 54 Miss. 726 (after certain advances were paid).

[1] Bregler *v.* Merchants' L. & T. Co. 164 Ill. 197 (45 N. E. 512).

[2] Thus bills and notes have been held to be negotiable, although the obligation to pay has been made dependent upon the return of the note or bill (Frank *v.* Wessells, 64 N. Y. 155); "as per memorandum or agreement." Jury *v.* Barker, El., Bl. & E. 459 (96 E. C. L. R. 359, note); First Nat. Bank *v.* Carson, 60 Mich. 432; 27 N. W. 589 (this note to be due if piano sold or removed); Kirk *v.* Dodge Co. Mut. Ins. Co., 39 Wis. 138 (15 Am. Rep. 36) ("If not paid at maturity the whole amount of premium on said policy shall be considered as earned and the policy be null and void, so long as this remains unpaid"). And see Massey *v.* Blair, 176 Pa. St. 34 (34 A. 925). And a note was held to be negotiable, although made payable on condition that a college be located in a certain place, if the condition has been fulfilled before negotiation or transfer of the note. Hart *v.* Taylor, 70 Miss. 655 (12 So. 553). But see *contra*, Chapman *v.* Wight, 79 Me. 595; 12 A. 546 ("then this note shall be given up").

does not make the ultimate payment of the obligation uncertain, the paper is negotiable notwithstanding. But if the stipulation makes the ultimate payment uncertain, it destroys the negotiability of the instrument. Thus, it has been generally held that a note, payable *on or before* a certain date, is nevertheless negotiable, the maker having it in his power to accelerate the payment, but no power to postpone payment beyond the given date.[1]

The same rule is applied, where a note is made payable on the death of the maker, or a certain time after his death.[2] The negotiability of a note is held not to be affected by a stipulation that, upon the non-payment of an installment of interest or principal, the whole amount of the note shall thereupon become due and payable.[3] But when a bill or note is made payable, "when convenient or possible," without stating any limit of time after which it shall be due and payable, absolutely and at all events; one can hardly find any reason for holding that the instrument is negotiable. And there are many cases, which maintain that such a bill or note is non-negotiable.[4] But

[1] First Nat. Bank *v.* Skeen, 101 Mo. 633 (14 S. W. 732); Goodlowe *v.* Taylor, 3 Hawks, 458 ("against the 19th of September, or when the house John Mayfield has undertaken to build for me is completed"); Buchanan *v.* Wren (Tex. Civ. App.), 30 S. W. 1077; Almer *v.* Palmer, 10 Kan. 464 (15 Am. Rep. 353) (payable within a certain time or "as soon as I can with due diligence make the money out of said patent right"); Ernest *v.* Steckman, 74 Pa. St. 13; 15 Am. Rep. 542; (do.). But see, *contra,* Stults *v.* Silva, 119 Mass. 137 (18 months from date "or sooner at the option of the mortgagor"); Carroll Co. Sav. Bank *v.* Strother, 28 S. C. 504; 6 S. E. 313 (whenever deemed insecure).

[2] Shaw *v.* Camp, 160 Ill. 425 (43 N. E. 608); Bristol *v.* Warner, 19 Conn. 7; Conn *v.* Thornton, 46 Ala. 587; Carnwright *v.* Gray, 127 N. Y. 92 (27 N. E. 835); Martin *v.* Stone (N. H.), 29 A. 845.

[3] De Hass *v.* Roberts, 59 Fed. 853; Carlon *v.* Keneally, 12 M. & W. 139; Wright *v.* Irwin, 33 Mich. 32; May *v.* City Bank, 58 Ga. 584; Sea *v* Glover, 1 Ill. App. 335; Markey *v.* Corey (Mich.), 66 N. W. 493; Merrill *v.* Hurley, 6 S. D. 592 (62 N. W. 958); Stark *v.* Olsen, 44 Neb. 646 (63 N. W. 37). But see *contra,* Kimball Co. *v.* Mellon, 80 Wis. 183 (48 N. W. 1100).

[4] Ex parte Tootell, 4 Ves. 372 (when my circumstances will admit without detriment to myself or family); Nunez *v.* Dauteles, 19 Wall. 560 ("as soon as the crop can be sold, or the money raised from any

there are also many cases in which the courts, in their desire to ascribe the character of negotiability to all commercial paper, have held these phrases to mean that the obligor promises to pay within a reasonable time, and have recognized the paper to be negotiable notwithstanding.[1]

A bill or note is held to be non-negotiable, where it is made payable on the happening in the alternative of two events, one of which is uncertain.[2] And so, likewise, where it is made payable in the alternative on one of two dates. But where the alternative days of payment are connected with the stipulation of payment in the alternative in two different places, as where a note is made payable in New York on one day, and in Liverpool on a subsequent day, the note has been held to be nevertheless negotiable.[3]

It has also been held that a stipulation for renewal of the note destroys its negotiability.[4]

Another ground for holding that a bill or note is non-negotiable, because the promise to pay is conditional, is where it is made payable out of a particular fund or debt, so that its payment depends absolutely upon the existence of the fund or debt, out of which it is to be paid.[5] But

source"); Salinas *v.* Wright, 11 Tex. 572 ("as soon as my circumstances will permit").

[1] Crooker *v.* Holmes, 65 Me. 195; 20 Am. Rep. 687 (when I sell my place where I now live); Kincaid *v.* Higgins, 1 Bibb. 396 ("as soon as I possibly can"); Ubsdell *v.* Cunningham, 22 Mo. 124 (to be paid as soon as collected from my accounts at P.); Works *v.* Hershey, 35 Iowa, 340 (when convenient).

[2] Sackett *v.* Palmer, 25 Barb. 179. But see Scull *v.* Roane, Hempst. C. C. 103.

[3] Henschel *v.* Mahler, 3 Hill, 132; *s. c.* 3 Denio, 428.

[4] Citizens Nat. Bank *v.* Piollet, 126 Pa. St. 194 (17 A. 603); Cofiln *v.* Spencer, 39 Fed. 262; Mitchell *v.* St. Mary (Ind. '97), 47 N. E. 224; Second Nat. Bank *v.* Wheeler, 75 Mich. 546 (42 N. W. 963).

[5] Munger *v.* Shannon, 61 N. Y. 251; Ehricks *v.* De Mill, 75 N. Y. 370; Brill *v.* Tuttle, 81 N. Y. 454; 37 Am. Rep. 515 ("and charge the same to our account for labor and materials performed and furnished"); Averett's Admr. *v.* Booker, 15 Gratt. 163 (76 Am. Dec. 203) (out of any money in his hands belonging to me); Kelly *v.* Bronson, 26 Minn. 359 (4 N. W. 607); Conroy *v.* Ferrie (Minn. 97), 71 N. W. 383.

when, in a bill of exchange, the drawer simply indicates, by a reference to a particular fund or account, how the drawee may reimburse himself, and does not intend that the payment of the bill should be conditional upon the existence or sufficiency of the fund, the bill will nevertheless be negotiable.[1] But mere indorsement on the note by the maker, of the value of his property, will not destroy its negotiability.[2]

§ 21. **Certainty as to amount of payment.**— Another requirement to the negotiability of a bill or note is, that the amount to be paid on the instrument must be certain, and definitely stated in the body of the instrument. If, upon reading the instrument, the definite amount of the obligation cannot be ascertained, the bill or note is non-negotiable, although the paper contains references to other papers or accounts, by resort to which the amount of payment can be definitely ascertained. The law-merchant requires that the amount due on the bill or note shall be ascertained from a reading of the paper itself.[3]

There are, however, certain well-established exceptions to the rule just stated, where the actual amount due on a note or bill is not to be ascertained on the face of the instrument, although the means of ascertaining the exact amount is provided in the body of the instrument. Probably, it is safe to say, that in no such case would the bill or note be

[1] Clark *v.* Lake Ave. & Loan Ass'n, 65 Hun, 625 (for S. account); Redman *v.* Adams, 51 Mo. 429 ("and charge the same against whatever amount may be due for my share of fish"); Ellet *v.* Britton, 6 Tex. 229 (in full of a certain judgment mentioned in bill).

[2] Hudson *v.* Emmons (Mich.), 65 N. W. 542.

[3] Cushman *v.* Haynes, 20 Pick. 132 ("deducting all advances and expenses"); Jones *v.* Simpson, 2 B. & C. 318 ("the proceeds of a shipment of goods, value about £2000, consigned by me to you"); Legio *v.* Staples, 16 Me. 252 ("whatever you may collect for me from A."); Dodge *v.* Emerson, 34 M. E. 96 (a certain sum and "all other sums that shall be due him"); Culbertson *v.* Nelson, 93 Iowa, 187 (61 N. W. 854); Palmer *v.* Ward, 6 Gray, 340; Fralich *v.* Norton, 2 Mich. 130 (55 Am. Dec. 56). And see Brooks *v.* Struthers (Mich. 97) 68 N. W. 272; Carmody *v.* Crane (Mich. 97), 68 N. W. 268 (provision for payment of taxes).

declared to be negotiable, if the source of information as to the exact amount due was not public property, and was within the more or less exclusive control of one of the parties to the paper.

It needs no authority to support the claim to negotiability of a bill or note, which contains a stipulation for the payment of a certain rate of interest on the principal sum.[1] So, also, although among the earlier authorities some doubt was expressed as to the negotiability of a bill or note, which was made payable *with exchange* on some money center; it is generally held now, that the negotiability of such an instrument is not affected by a stipulation for payment *with exchange*.[2] Where a note or bill contains a stipulation for the principal sum and interest, *with attorneys' fees* and *costs of collection*, the authorities are more evenly divided, whether such a stipulation destroys the negotiability of the instrument.[3] The same contradiction of authority

[1] And the fact, that the note calls for a higher rate of interest after maturity, is held not to destroy it negotiability. Crump *v.* Berdan, 97 Mich. 293; 56 N. W. 559; Hope *v.* Barker, 112 Mo. 338 (20 S. W. 567); *contra*, Hegeler *v.* Comstock, 1 S. D. 138 (45 N. W. 331).

[2] Price *v.* Teall, 4 McLean, 201; Morgan *v.* Edwards, 53 Wis. 599 (11 N. W. 21); Bullock *v.* Taylor, 39 Mich. 137; Culbertson *v.* Nelson, 93 Iowa, 187 (61 N. W. 854); First Nat. Bank *v.* Dubuque S. W. R. R. Co., 52 Iowa, 378 (35 Am. Rep. 280; 3 N. W. 395). See *contra* Low *v.* Bliss, 24 Ill. 168 (76 Am. Dec. 742); Fitzharris *v.* Leggatt, 10 Mo. App. 527; First Nat. Bank *v.* Slette (Minn. 97); 69 N. W. 1148. See Second Nat. Bank *v.* Basuier, 12 C. C. A. 517; 65 F. 58, and *contra*, Carroll Co. Sav. Bk. *v.* Strother, 28 S. C. 504 (6 S. E. 313).

[3] That it does not destroy its negotiability, see Oppenheimer *v.* Farmers' Bank, 97 Tenn. 19; 36 S. W. 705; Smith *v.* Muncie Nat. Bank, 29 Ind. 158; Stapleton *v.* Louisville Banking Co., 95 Ga. 802 (23 S. E. 81); Howentein *v.* Barnes, 5 Dill. 482; Dorsey *v.* Wolff, 142 Ill. 589 (32 N. E. 495); Sperry *v.* Horr, 32 Iowa, 184; Gilmore *v.* Hirst, 56 Kan. 626 (44 P. 603); Md. Fertilizing Co. *v.* Newman, 60 Md. 584; Stark *v.* Olsen, 44 Neb. 646 (63 N. W. 37); First Nat. Bank *v.* Slaughter, 98 Ala. 602 (14 So. 545). That the stipulation, though good and valid, destroys the negotiability of the instrument, see Woods *v.* North, 84 Pa. St. 407 (24 Am. Rep. 201); Clark *v.* Barnes, 58 Mo. App. 667; First Nat. Bank *v.* Gay, 63 Mo. 33 (21 Am. Rep. 430); Adams *v.* Seaman, 82 Cal. 636 (23 P. 53); Jones *v* Radlitz, 27 Minn. 240 (6 N. W. 800); Nicely *v.* Commercial Bank, 15 Ind. App. 563 (44 N. E. 570); First Nat. Bank *v.* Laughlin, 4 N. D. 391 (61 N. W. 473); Second Nat. Bank *v.* Basuier, 12 C. C. A. 517; 65 F. 58. In a few States,

exists as to the effect of the insertion in a note of an authority to confess judgments.[1] A stipulation in a note, that the maker shall pay all assessments of taxes against property, on which a mortgage was given to secure the payment of the note, destroys its negotiability.[2] But indorsements of credits on the back of a note or bill would not affect its negotiability.[3]

§ 22. **Payment in money only.**— Another requisite of negotiability is, that the instrument should call only for the payment of money. If the instrument should call for the doing or buying of something else, or for the payment of money or the delivery of something else in the alternative, negotiability is denied to the instrument, and it becomes a non-negotiable contract.[4] In the contemplation of the law, money is any medium of exchange which is recognized by the law of the country, in which the bill or note is made or to be performed, as a legal tender in the satisfaction of debts. Two propositions, deducible from that definition, are to be borne in mind: *First.* Anything which the law declares to be legal tender is money, and nothing else. *Secondly.* Foreign money is not legal tender, in the satisfaction of domestic debts. In this country, at the present day (1898),

the stipulation for attorneys' fees or costs of collection, in addition to lawful interest, is held to be a violation of the laws against usury. State *v.* Taylor, 10 Ohio, 378; Dow *v.* Updike, 11 Neb. 95; Boozer *v.* Anderson, 42 Ark. 167.

[1] That the note is negotiable, see Osborn *v.* Hawley, 19 Ohio, 130; Zimmerman *v.* Anderson, 67 Pa. St. 421 (5 Am. Rep. 447). That it is thereby made non-negotiable, see Law *v.* Crawford, 67 Mo. App. 150; First Nat. Bank *v.* Marlow, 71 Mo. 618; Sweeney *v.* Thickstun, 77 Pa. St. 131.

[2] Walker *v.* Thompson (Mich.), 66 N. W. 584.

[3] Farmers' Bank of Springville *v.* Shippey, 182 Pa. St. 24 (37 A. 844).

[4] Hodges *v.* Shuler, 22 N. Y. 114 (promise to pay $1,000 or *upon surrender of note to issue stock*, etc.); Lawrence *v.* Dougherty, 5 Yerg. 435 (payable "in ginned cotton, at eight cents per pound"); Auerbach *v.* Pritchett, 58 Ala. 451; Culbertson *v.* Nelson, 93 Iowa, 187 (61 N. W. 854). But see *contra* Borah *v.* Curry, 12 Ill. 66; Bilderback *v.* Burlingame, 27 Ill. 341.

gold and silver dollars, and the United Treasury notes,[1] are legal tender. A bill or note, calling for the payment of anything else, is non-negotiable. But it is permissible to provide that the bill or note shall be payable in only one of these three kinds of legal tenders, as, for example "payable in gold coin." [2] A bill or note, made expressly payable in National bank notes, would undoubtedly be non-negotiable.

Prior to the civil war in this country, the State banks issued notes, which, under the law, passed as currency, and their value was more or less depreciated. It became a common custom for bills and notes to be made payable in a particular currency. There can be little doubt that such bills and notes were non-negotiable, according to the common law merchant.[3] And under that banking system it was the rule, rather than the exception, for bills and notes to be made payable in a particular currency, or generally, "in current funds" "in currency" "in good current money," and the like. *Currency* has a broader signification than *money*, and includes every medium of exchange, although it may not be legal tender. When Congress declared the United States Treasury notes to be legal tender, some of the courts held that, when a bill or note was made payable "in current funds," "in currency" and the like, without specifying any particular currency, the paper must be construed as calling for payment in the legal tender of the country.[4]

[1] As to the power to declare these notes legal tender, see Tiedeman's Limitations of Police Power, § 90.

[2] Chrysler *v.* Griswold, 42 N. Y. 209; Burton *v.* Brooks, 25 Ark. 215 (payable in Greenback currency), meaning United States Treasury notes; Wright *v.* Morgan (Tex. Civ. App.), 37 S. W. 627 (payable in gold).

[3] Wright *v.* Hart, 44 Pa. St. 454 (in current funds of Pittsburg); Leiber *v.* Goodrich, 5 Cow. 186 (in Pennsylvania or New York currency); Pardee *v.* Fish, 60 N. Y. 265 (19 Am. Rep. 176); Dillard *v.* Evans, 4 Ark. 175 (in common currency of Arkansas); Warren *v.* Brown, 64 N. C. 381 (in current notes of North Carolina); Lange *v.* Kohne, 1 McCord, 115 (in paper medium); Taylor *v.* Neblett, 4 Heisk. 491 ("In Tennessee money").

[4] Bull *v.* Bank of Kasson, 123 U. S. 105; Frank *v.* Wessels, 64 N. Y.

It is not objectionable to the negotiable character of a bill or note that it calls for the payment of a certain quantity of foreign money; but if it is made payable in foreign money, it is non-negotiable. Where the denominations of the foreign money are different from those of the domestic money, no difficulty can arise from the fact that the paper calls for the payment of a certain amount of foreign money. But, where the denominations are the same in both countries, it is difficult to determine whether the reference to foreign money is intended to indicate the value of the money called for by the paper, or that it shall be payable in the foreign money. Thus, Canada and the United States have the same denominations; and during the Civil War, when the United States money was depreciated, it was customary in trade on the border to insert in notes, which were made on a specie or gold basis, that they were payable *in Canada money.* In two cases, arising in Michigan and New York, two opposite conclusions were reached as to the effect of this provision. In the Michigan case, the court held that the note could only be paid in Canada money, and hence was non-negotiable; and in the New York case, it was held that the parties had used the phrase to indicate the amount in specie which was to be paid, and that the note was negotiable, because it could be liquidated by the payment of United States Treasury notes of the same value as the Canada dollar.[1]

The denomination of money must generally be stated in the body of the instrument. It need not, however, be written in words; the denominational mark, for example, "£" or "$" being sufficient, whether it appears in the body of the instrument or in the marginal note, the payee or holder

155; Burton *v.* Brooks, 25 Ark. 215. But see, *contra*, Huse *v.* Hamblin, 29 Iowa, 501 (4 Am. Rep. 244). Where the instrument is made payable "in good current money" and the like, the construction, that only legal tender was intended, becomes more rational. Wharton *v.* Morris, 1 Dall. 133 (in lawful current money of Pennsylvania); Black *v.* Ward, 27 Mich. 191 (15 Am. Rep. 162).

[1] Thompson *v.* Sloan, 23 Wend. 71 (35 Am. Dec. 546); Black *v.* Ward, 27 Mich. 191 (15 Am. Rep. 162).

being impliedly authorized in that case to fill in the denomination.[1]

It is customary to write the sum of money in full in the body of the instrument, and to express it in figures in the upper or lower left-hand corner. But the statement in figures in the corner is only a memorandum and does not constitute, in the contemplation of commercial law, any part of the instrument. Where there is a variance between the figures so placed and the written words in the body of the instrument, the written words will invariably determine the amount called for; but the figures in the margin can be properly referred to, where the written words are indistinct, for the purpose of verification of the amount which is presumably required to be paid on the instrument.[2] So immaterial are the figures in the margin of a bill or note, that it is held not to be a forgery to alter them, so as to make them conform to the written statement of the amount in the body of the instrument;[3] and if the amount to be paid is not stated in the body of the bill or note, it is a defective instrument, and resort to the marginal figures cannot supply the deficiency.[4]

§ 23. **The place of payment.**— If no place of payment is given in the bill or note, it is payable at the place of business of the primary obligor; and at his residence, if he have no place of business. If it is a note, it is payable at the maker's place of business or residence; and if it is a bill, it must be presented for acceptance and payment at the place of business or residence of the drawee and acceptor. If the bill or note states a place of payment, presentment

[1] Sweetser *v.* French, 13 Met. 262; Beardsley *v.* Hill, 61 Ill. 354.

[2] Com. *v.* Emigrant Ins. Bank, 98 Mass. 12 (93 Am. Dec. 126); Riley *v.* Dickens, 19 Ill. 29; Norwich Bank *v.* Hyde, 13 Conn. 279; Hollen *v.* Davis, 59 Iowa, 444 (44 Am. Rep. 688).

[3] Sweetser *v.* French, 13 Met. 262.

[4] Hollen *v.* Davis, 59 Iowa, 444 (44 Am. Rep. 688); Norwich Bank *v.* Hyde, 13 Conn. 279. But see *contra*, Garrett *v.* Interstate Bank, 79 Tex. 133 (15 S. W. 274). See *post*, § 28, as to authority to fill up blanks.

must be made at that place, in order to hold the drawer sureties and indorsers liable.[1]

Generally, it is not necessary to the negotiability of a bill or note, to insert a statement of a place of payment. But in some of the States, it is now required by statute.[2]

§ 24. **Acknowledgment of consideration.**— It is an almost invariable custom to insert in a bill or note the words *value received*, or others of like import, as an acknowledgment of the receipt of a consideration from the payee. But, although it was at an early date held essential to the negotiability of bills of exchange, it is now very generally held in the United States, as well as in England, that no acknowledgment of consideration is necessary to the negotiability of such instruments, except in the case of promissory notes, where the local statute, in giving the character of negotiability to notes, requires the general acknowledgment of consideration.[3] When the words *value received* are inserted in a note, it is held to be an acknowledgment of consideration between the maker and payee; but in a bill, it is *prima facie* evidence of consideration between the drawee and payee, as a general

[1] Cox *v.* National Bank, 100 U. S. 704; Bank of United States *v.* Smith, 11 Wheat. 171; Hills *v.* Place, 48 N. Y. 520 (8 Am. Rep. 568).

[2] Cox *v.* National Bank, 100 U. S. 704, construing the Alabama statute. In Virginia, it is required that the bill or note shall be payable at a particular bank or business office. Freeman's Bank *v.* Ruckman, 16 Gratt. 126; Holloway *v.* Porter, 46 Ind. 62. See Anniston L. & T. Co. *v.* Stickney, 108 Ala. 146 (19 So. 63), where it is held that the place of payment may be shown by parol evidence, where such stipulation of place of payment is necessary to negotiability of a bill or note.

[3] Noyes *v.* Gilman, 65 Me. 589; Courtney *v.* Doyle, 10 Allen, 122; Hook *v.* Pratt, 78 N. Y. 371 (34 Am. Rep. 539); Bristol *v.* Warner, 19 Conn. 7; Dean *v.* Carruth, 108 Mass. 242; People *v.* McDermott, 8 Cal. 288. It seems, also, that "value received," or some other acknowledgment of consideration, is not always held to be necessary to the negotiability of a promissory note, even though the statute enumerates it as one of the elements of a negotiable note. Bailey *v.* Smock, 61 Mo. 213. Acknowledgment of consideration not required in Illinois to make commercial paper negotiable. Haines *v.* Nance, 52 Ill. App. 406 (Rev. Stat. Ill., ch. 98, § 3). But see Hart *v.* Harrison Wire Co., 91 Mo. 414 (4 S. W. 123).

rule, *i. e.*, where the bill is drawn payable to the order of a third person. But where the bill is made payable to the drawer's order, so that the drawer and payee are the same persons, it is presumed to be an acknowledgment of consideration between the drawer and drawee or acceptor.[1]

The words *value received* imply that there has been a valuable and substantial consideration.[2] But it is always possible to show by parol evidence that, notwithstanding this acknowledgement of consideration, no consideration actually passed between the parties.[3]

Although it is not necessary to do more than to insert a general acknowledgment of consideration, by the use of such words as *for value received*, the specific consideration of the bill or note may be inserted without affecting the negotiability of the instrument, even though the particular consideration cannot be proven. The general implication of consideration will enable the parties to prove the actual consideration, whatever it is.[4]

§ 25. **Sealed instruments not negotiable.**— The weight of authority is decidedly in favor of the proposition that, in the absence of statutory regulations to the contrary, the sealing of a bill or note will destroy its negotiability, notwithstanding that the general common law prohibition of the assignment of *choses in action* has been repealed. It is still held to be a requisite of bills and notes that they must be *open letters*, *i. e.*, unsealed.[5]

[1] Highmore *v.* Primrose, 5 M. & S. 65; Mandeville *v.* Welch, 5 Wheat. 277.

[2] Mandeville *v.* Welch, 5 Wheat. 277; Delano *v.* Bartlett, 6 Cush. 364; Williamson *v.* Cline (W. Va.), 20 S. E. 917; Hill *v.* Todd, 29 Ill. 101; Muller *v.* Cook, 23 N. Y. 495; Martin *v.* Hazard, 2 Colo. 596.

[3] Schoonmaker *v.* Roosa, 17 Johns. 301; Russell *v.* Hall, 10 Mart. (8 La. N. S.) 288; Parish *v.* Stone, 14 Pick. 198 (25 Am. Dec. 373); Snyder *v.* Jones, 38 Md. 542.

[4] Sylvester *v.* Staples, 44 Me. 496; Corbett *v.* Clark, 45 Wis. 403 (30 Am. Rep. 763; Abbott *v.* Hendricks, 1 Man. & Gr. 791; Buchanan *v.* Wren, Tex. Civ. App. (30 S. W. 1077).

[5] Frenall *v.* Fitch, 5 Whart. 325; Warren *v.* Lynch, 5 Johns. 239; Lewis *v.* Wilson, 5 Blackf. 370; Sidle *v.* Anderson, 45 Pa. St. 464; Barden *v.* Southerland, 70 N. C. 528; Rawson *v.* Davidson, 49 Mich. 607; Osborn *v.*

If a bill or note is sealed by the use of a wafer or an impression on wax, there can be no doubt that it was intended to make it a sealed instrument, and to take from it the character of negotiability, although no reference is made to sealing in the body of the instrument. But if the sealing consists of a scroll,— which in most of the United States is a sufficient sealing, only when there is a reference to sealing in the body of the instrument,— affixing the scroll does not make a bill or note a sealed instrument, unless in the body of the instrument it is stated that it has been sealed.[1]

Where the party, executing a bill or note, is a corporation, the addition of the seal does not ordinarily destroy its negotiability, in any case.[2]

§ 26. **Delivery.**— Until the bill or note has been delivered, it can have no validity; and, although delivery is presumed to have been made on the given date of the paper, this presumption can be overthrown by parol evidence of a delivery on some other day, preceding or following the date. In such a case, the life of the bill or note begins on the actual day of delivery, and not on the stated date of the paper.[3]

Kistler, 35 Ohio St. 89. One must bear in mind in this connection the distinction already made (see *ante*, § 17) between negotiability and assignability. The sealed note or bill is assignable, but the assignee takes it subject to equitable defenses. Clute *v.* Robison, 2 Johns. 595; Hall *v.* Hickman, 2 Del. ch. 318; Barrow *v.* Bispham, 6 Halst. 116; Helfer *v.* Alden, 3 Minn. 332; Parks *v.* Duke, 2 McCord, 380. And no days of grace are allowed on a sealed note or bill. Skidmore *v.* Little, 4 Tex. 301.

[1] Humphries *v.* Nix, 77 Ga. 98; Van Bockkellen *v.* Taylor, 62 N. Y. 105; Bancroft *v.* Haines, 13 Pa. Co. Ct. 116; 2 Pa. Dist. 373. In some of the States, by statute, instruments, which would otherwise be negotiable, are not changed in character by being sealed. For these States, see Tiedeman Com. Paper, § 32.

[2] Central Nat. Bank *v.* Railroad Co., 5 S. C. 156 (22 Am. Rep. 12); Dutton *v.* Marsh, L. R. 6 Q. B. 361; In re Imperial Land Co., L. R. 11 Eq. 498; Jackson *v.* Myers, 43 Md. 452. But see *contra,* Clark *v.* Farmers Mfg. Co., 15 Wend. 256. As to the use of the seal in the execution of bonds, see Tiedeman's Com. Paper., Chap. XXV.; and the use of a seal by a private corporation in the execution of a bill or note, see *post*, § 45.

[3] Cransan *v.* Goss, 107 Mass. 439 (9 Am. Rep. 45); Lovejoy *v.* Whipple 18 Vt. 379 (46 Am. Dec. 157); Gale *v.* Miller, 54 N. Y. 536; Marvin *v.*

But the maturity of the paper, where it is made payable so many days *after date*, is computed from the stated date, and not from the actual day of delivery.[1] So necessary is delivery to the life of a bill or note, that if it is found in his possession after the death of the maker or drawer, the payee cannot sue the estate on it; nor does the payee acquire title to the instrument, if it is subsequently delivered to him by the personal representative of the deceased maker or drawer.[2] The same rule obtains in the case of a partnership note, not delivered before the dissolution of the firm. It cannot be delivered afterward except with the consent of all the partners,[3] and it is to be presumed that it cannot be delivered at all, where the dissolution of the partnership resulted from the death of one of the partners.

If a bill or note is delivered to the personal agent of the drawer or maker, the delivery is not complete, so as to pass title, until the agent has in turn delivered it to the payee or his agent. Until such second delivery, the maker or drawer can recall it from the agent.[4] And this principle has been applied to the transmission of a bill or note by mail to the payee. As long as it is *in transit*, it can be recalled, and the recall will prevent any acquisition of title thereto by the payee; since the postal authorities

McCullum, 20 Johns. 288; Thomas *v.* Watkins, 16 Wis. 549; Dunavan *v.* Flynn, 118 Mass. 537; Richards *v.* Darst, 51 Ill. 140.

[1] Powell *v.* Waters, 8 Cow. 669; Bumpass *v.* Timms, 3 Sneed. 459. See *ante*, §§ 7, 8.

[2] Smith *v.* Wyckoff, 3 Sandf. Ch. 77; Clark *v.* Sigourney, 17 Conn. 511; Purviance *v.* Jones, 120 Ind. 162 (21 N. E. 1099); Perry *v.* Crammond, 1 Wash. C. C. 100. The latter case holding, however, that the payee has a claim on the undelivered note, if he had actually parted with the consideration for the same. This is more properly described as a claim against the estate for a return of the consideration. And where a note is retained by maker as agent of payee, the personal representatives may deliver it after death of maker. Welch *v.* Dameron, 47 Mo. App. 221.

[3] Gale *v.* Miller, 54 N. Y. 536; Woodford *v.* Dorwin, 3 Vt. 82 (21 Am. Dec. 573).

[4] Devries *v.* Shumate, 53 Md. 211; Brind *v.* Hampshire, 1 M. & W. 365. Otherwise, where third party is agent of both parties. Stockton Sav. &c. Soc. *v.* Giddings, 96 Cal. 84 (30 P. 1016). See Morris *v.* Preston, 93 Ill. 215.

are for that transaction held to be the agent for delivery of the maker or drawer.[1] But if it is not recalled, the deposit of the letter, containing the bill or note, in the mail constitutes a sufficient delivery to pass title.[2]

Where, however, the note or bill is delivered to an agent of the payee, or to a custodian or bailee, who is to deliver it to the payee at his convenience, upon certain conditions, or at a certain time in the future, the delivery is complete, and title passes, even though the delivery to the payee is not made until after the death of the maker or drawee.[3] But delivery to a stranger is not good, *i. e.*, where the stranger cannot be considered in any sense as a bailee or agent of the payee.[4]

The delivery must also be made with the intention to pass title and to complete the transaction. If the note or bill be handed to the payee or his agent, solely for the purpose of examination, or with the understanding that no title shall pass before performance of a condition; the delivery is not complete, and suit cannot be maintained by payee on that paper.[5] In this discussion of these unusual methods of delivery, the effect of the same is here

[1] Muller *v.* Pondir, 55 N. Y. 325 (14 Am. Rep. 259). In this case a letter containing the note was given to maker's agent in Havana, to be mailed when the vessel arrived at New York. And see Norton *v.* Norton, 49 Hun, 605.

[2] Kirkman *v.* Bank of America, 2 Coldw. 397; Mitchell *v.* Byrne, 6 Rich. 171; Hyde *v.* Goodnow, 3 N. Y. 266; Ex parte Cote, L. R. 9. Ch. App. 27.

[3] Giddings *v.* Giddings, 51 Vt. 227 (31 Am. Rep. 682); Mason *v.* Hyde, 41 Vt. 432; Richardson *v.* Lincoln, 5 Met. 201; Bodley *v.* Higgins, 73 Ill. 375; Shaw *v.* Camp, 160 Ill. 425 (43 N. E. 608); Elliott *v.* Deason, 64 Ga. 63; Stockton Sav. &c. Soc. *v.* Giddings, 96 Cal. 84; 30 P. 1016 (third party was agent of both parties).

[4] Gordon *v.* Adams, 127 Ill. 223 (19 N. E. 557); Adams Bank *v.* Jones, 16 Pick. 574.

[5] Carter *v.* McClintock, 29 Mo. 464; Hurt *v.* Ford (Mo.), 36 S. W. 671 Ruggles *v.* Swanwick, 6 Minn. 526; Dodd *v.* Dunne, 71 Wis. 578 (37 N. W. 430). And the same rule holds, where a note is executed and delivered in jest. Shipley *v.* Carroll, 45 Ill. 285. But a note or bill is presumed to have been delivered when it is in possession of the payee. Garrigus *v.* Home &c. Soc., 3 Ind. App. 91; 28 N. E. 1009.

considered, only as it bears upon the rights of the immediate payee, and the rights of subsequent *bona fide* holders are not taken into consideration. Their rights are considered in a subsequent chapter.[1]

Inasmuch as the life of a contract begins on the day of delivery, its validity is determined then, and not by its stated date. Where, therefore, the State law makes contracts invalid, when made on Sunday; if a note is delivered on Sunday it is invalid, although it may bear a different date. On the other hand, if it is dated and executed on Sunday, but it is not delivered on that day, it is not a Sunday contract, and is valid, although the maturity is computed from the date given.[2]

§ 27. **Delivery as an escrow.**— An *escrow* is generally defined as a legal instrument, delivered to a third person to be held by him until the happening of a certain condition, when the title is to pass to the grantee or person for whom the instrument was intended. In the law of real property, and also the law of personal property generally, until the condition happens or is performed, no title is acquired by the intended grantee, even though the deed or property is delivered to him prior to such performance of the condition; and any *bona fide* purchaser from the grantee or vendee could acquire no title, which he could assert against the grantor or vendor in escrow.[3] In applying the doctrine of *escrow* to negotiable bills and notes, the difficulty is met with, that if a *bona fide* purchaser where a bill or note is delivered in *escrow*, cannot acquire title, which he

[1] See *post*, chapter on Bona Fide Holders.

[2] Drake *v.* Rogers, 32 Me. 524; Marshall *v.* Russell, 44 N. H. 509; Flanagan *v.* Meyers, 41 Ala. 132; King *v.* Fleming, 72 Ill. 21 (22 Am. Rep. 131); Davis *v.* Barger, 57 Ind. 54. But it has been held that a note or bill, delivered on Sunday, may be subsequently ratified, and thereby made a valid contract. Winchell *v.* Carey, 115 Mass. 560 (15 Am. Rep. 151); Lovejoy *v.* Whipple, 18 Vt. 379 (46 Am. Dec. 157); King *v.* Fleming, 72 Ill. 21 (22 Am. Rep. 131); Smith *v.* Case, 2 Oreg. 190. And in any event the payee can recover the consideration paid for the paper. Sayre *v.* Wheeler, 31 Iowa, 112.

[3] See Tiedeman on Real Prop., § 815; Tiedeman on Sales, § 325.

could enforce against the drawer and acceptors of the bill, and against the maker of the note, the commercial value of bills and notes, as substitutes for money, would be very seriously curtailed. Hence, it has been held very generally, that, although delivery of a bill or note *in escrow* will not pass title, before the performance of the condition to the payee, or any subsequent holder who takes it without value or with notice of the unperformed condition of the *escrow*, a *bona fide* holder for value can hold all the parties liable on the paper.[1]

§ 28. **Delivery of bills and notes executed in blank.**— Where a bill or note is signed in blank, and delivered to the payee or a third person, with the authority to fill up the blanks, no second delivery is needed; and the validity of the paper will, after its completion, relate back to the time of its delivery by the maker or drawer.[2] Where the instrument is a deed, or any instrument under seal generally, the authorities are at variance on the question of the necessity of a second delivery.[3] But it seems that a coupon bond, having the characteristics of negotiable paper, may be delivered in blank, to be completed by another, without requiring a second delivery after its completion.[4] And where a blank note is filled out by an unauthorized agent, and it is delivered by him to the payee, ratification by the maker is a good rebuttal to the defense of want of authority.[5]

The agent, to whom the blank instrument is given to fill

[1] Benton *v.* Martin, 52 N. Y. 570; Black River Ins. Co. *v.* N. Y. &c. T. Co., 73 N. Y. 282; Jones *v.* Shaw, 67 Mo. 667; Fearing *v.* Clark, 16 Gray, 74 (78 Am. Dec. 394); Foy *v.* Blackstone, 31 Ill. 538 (83 Am. Dec. 246); Hutchinson *v.* Brown, 19 D. C. 136. But see *contra*, Chipman *v.* Tucker, 38 Wis. 43 (20 Am. Rep. 1).

[2] Davidson *v.* Lanier, 4 Wall. 458; Angle *v.* N. W. &c. Ins. Co., 92 U. S. 330; Bank of Pittsburg *v.* Neal, 22 How. 96; Hensel *v.* Chicago &c. R. R. Co., 37 Minn. 88 (33 N. W. 329); Rich *v.* Starbuck, 51 Ind. 87; Ives *v.* Farmers' Bank, 2 Allen, 236; Snyder *v.* Van Doran, 46 Wis. 602 (32 Am. Rep. 739).

[3] See Tiedeman Real Prop., § 789.

[4] White *v.* Vermont &c. R. R. Co., 21 How. 575.

[5] Bremner *v.* Fields (Tex. Civ. App.), 34 S. W. 447.

out, cannot bind principal by inserting any unusual clause; at least as against the immediate payee who takes the paper with knowledge of the interposition of the agent. He is not even authorized to add "with interest" to a renewal of a note in which interest was stipulated for.[1]

ILLUSTRATIVE CASES.

Funk *v.* Babbitt, 156 Ill. 408 (41 N. E. 166).
Armstrong *v.* Pomeroy Nat. Bank, 46 Ohio St. 512 (22 N. E. 866).
Brown *v.* Butchers' and Drovers' Bank, 6 Hill, 443.
Witty *v.* Michigan Mut. L. Ins. Co., 123 Ind. 411 (24 N. E. 141).
Dorsey *v.* Wolff, 142 Ill. 589 (32 N. E. 495).
Brown *v.* Jordhall, 32 Minn. 135 (19 N. W. 650).
Riggs *v.* Trees, 120 Ind. 402 (22 N. E. 254).

Bill of Exchange Without Naming Drawee — Form of Action and Rights of Parties.

Funk *v.* Babbitt, 156 Ill. 408 (41 N. E. 166).

BAKER, J. This was assumpsit brought by Erasmus D. Babbitt, appellee, against Francis M. Funk, the appellant, and one Ira Lackey, as partners under the firm name of Funk & Lackey. The 15 special counts of the declaration counted upon 15 promissory notes claimed to have been made by the firm to appellee, and the declaration also contained the common counts. The firm had been dissolved a year or more prior to the commencement of the suit. Lackey made default. Appellant interposed four pleas,— nonassumpsit, no consideration, that he did not execute the notes, and denial of joint liability,— and the two latter pleas were verified by affidavit. A jury trial resulted in a verdict and judgment in favor of appellee, and against both partners of the late firm, for $4,240. There was an affirmance of the judgment upon appeal of Funk to the appellee court, and he then brought the case here by this appeal.

It is claimed that the circuit court committed error in proceeding to trial without issue being joined upon the plea of nonassumpsit and those in denial of the execution of the notes and of joint liability. All three of said pleas concluded to the country, and no formal similiter was added to either. It is the doctrine of this court that going to trial without formal issue being joined on a plea is a waiver of a formal joinder, and the irregularity is cured by the verdict. Anderson *v.* Jacobson, 66 Ill. 522; Strohm *v.* Hayes, 70 Ill. 41; People *v.* Weber, 92 Ill. 288.

[1] Meise *v.* Doscher, 83 Hun, 580; 31 N. Y. S. 1872.

It is assigned as error that the trial court permitted to be introduced in evidence six of the written instruments purporting to be signed by the firm of Funk & Lackey. These several instruments were, in form, substantially like this: "$350.00. Bloomington, Ill., April 23, 1891. Thirty days after date, pay to the order of E. D. Babbitt three hundred and fifty dollars, for value received. Funk & Lackey." Said instruments were declared on as promissory notes. It is urged that they are not notes, or even promises to pay, and, not being directed to any one, do not constitute drafts or orders, and in fact amount to no more than blank pieces of paper. They are, undoubtedly, very irregular and informal instruments, but they are not void as written evidence of indebtedness. A person may draw a bill upon himself, payable to a third person, in which case he is both drawer and drawee. Here the firm drew bills, but did not address them to any third person or persons, and it is therefore to be regarded that they were, in legal effect, addressed to themselves, as drawees, and the signatures of the firm to the several bills bound the firm, both as drawers and acceptors. The instruments are inland bills of exchange, to which the firm sustain the triple relation of drawers, drawees, and acceptors. And, as the declaration contains the consolidated counts, the bills were admissible in evidence under them. Moreover, the drawers and drawees being the same, the bills are, in legal effect, promissory notes, and may be treated as such, or as bills, at the holder's option. 1 Daniel Neg. Inst. §§ 128, 129.

Complaint is made that counsel were permitted, over the objections of appellant, to ask numerous leading questions of Babbitt, the plaintiff below. On both sides of the case the rule excluding such questions on the direct examination of witnesses was rather loosely enforced,— more so than is advisable. Greenleaf says (1 Greenl. Ev., § 435), that when and under what circumstances a leading question may be put is a matter resting in the sound discretion of the court, and not a matter which can be assigned for error. And this court has held that a general objection to a question will not reach the objection of its being leading, and that trial courts must be allowed to exercise a large discretion on the subject of leading questions. Parmelee *v.* Austin, 20 Ill. 35; Bank *v.* Dunbar, 118 Ill. 625; 9 N. E. 186. We do not understand the law, as held in this State, to be that an assignment of error will not lie for permitting leading questions to be asked; but we do understand the doctrine to be that the matter of allowing such questions is so much a matter within the discretion of the trial court as that a judgment will not be reversed for a ruling in regard thereto, unless it is manifest that there has been a palpable abuse of discretion, and also a substantial injury done. Upon inspection of the record, we find that in almost every instance the objections interposed were general objections, and not placed upon the ground that they were leading. In a comparatively few instances the objections were put upon

that specific ground. But, so far as we can discover, in every such instance either the objections were made after the questions had been answered, and no motions made to exclude, or the questions and answers were substantially repetitions of questions and answers already in the record, or else the inquiries were in regard to minor and unimportant matters. Moreover, Babbitt, at the time of his examination, was over 82 years of age, and it is apparent from the record that the infirmities of old age made it difficult to get his testimony upon the real matters involved in the controversy without, to some extent, resorting to direct and pointed interrogatories. Upon the whole, we are unable to come to the conclusion that the action and the rulings of the court in the premises show such a palpable and injurious abuse of discretion as to constitute reversible error.

It is claimed that the court erred in allowing Lackey to testify, in answer to leading questions, over the objections of appellant, that the money he got of Babbitt "was used in firm business." The examination was thus: "Q. What was done with the money? A. Used to pay debts of the firm. (Objection and exception by defendant's counsel.) Q. Was it used in the firm? (Objection by defendant.) A. Yes, sir. (Defendant excepted.) The Court: That is all right, as far as it goes. (Defendant excepted.) Q. Was that money used in the firm business? (Objection by defendant, as calling for conclusion.) A. Yes, sir. The Court: I suppose it is a matter of fact, whether it was that way or not. He may answer that. (Defendant excepted.") We think that, from the standpoint of the views already expressed, this claim of error is not well made.

The 15 notes in suit — the first bearing date December 13, 1890, the last bearing date May 27, 1891, and the others bearing intermediate dates — were executed by Lackey, in the name of the firm, for moneys borrowed of appellee at said several times. The moneys were delivered in the form of checks on the People's Bank of Bloomington, signed by Babbitt, and payable to Funk & Lackey or bearer. Appellant and Lackey were, and for many years had been, partners in the retail drug business at Bloomington, under the firm name of Funk & Lackey. Lackey had the principal care and management of the business, Funk giving it but little personal attention. At the trial the theory of plaintiff below (appellee here) was that he had loaned his money to the firm, and had taken the firm notes therefor, the money being delivered to, and the notes signed by Lackey, one of the partners, acting in behalf of, and as the agent of the firm. The theory of the defendant was that Lackey had borrowed the money as an individual, and for his own personal use, under an agreement to give the firm notes as security therefor, and that appellee had cognizance of these facts at the time of the transactions. There was evidence tending to prove each of these theories of the case. The instructions that were given on motion of appellee are not challenged. Appellant tendered to the court an instruction which

read as follows: "(4) The court instructs the jury that although they may believe from the evidence that the plaintiff loaned the money to the amount of the notes offered in evidence, and took such notes thereof, yet if the jury further believe from the evidence that such money was in fact borrowed for the use of Lackey, and not of the firm, and that the plaintiff knew such fact, if it be a fact, or if the jury believe that the plaintiff knew, or had notice, that Lackey had no power so to bind the firm, or that the money, if any, was not in good faith loaned to the firm, then in either of such cases the jury should find the issues for the defendant." The court did not give said instruction, as asked, but modified it by adding thereto, at its end, the following words: "Unless the plaintiff has proven by preponderance of the evidence that the firm of Funk & Lackey did in fact receive and use the money of the plaintiff." And the court then gave the instruction, as modified, to the jury. And the court made a like modification to three others of the instructions submitted by appellant, before giving them to the jury. But the court also gave to the jury, at the instance and upon the motion of appellant, two other instructions, which read as follows: "(1) The court instructs the jury that if the plaintiff has failed to prove by a preponderance of the evidence that Funk & Lackey received money, and if the jury further believe from the evidence that the money was loaned to Ira Lackey personally, then in such case the jury should find a verdict for the defendant Funk. And that should be the verdict of the jury, although it may appear from the evidence that Ira Lackey, at each of the times of making the several loans, as security therefor, gave to the plaintiff a note signed 'Funk & Lackey.'" "(8) The court instructs the jury that, before the plaintiff can recover in the case, he must prove by preponderance of the evidence either one or both of the following: First, that the firm of Funk & Lackey actually received his money; second, that he actually loaned it in good faith to the firm of Funk & Lackey, and in good faith to receive their note therefor,— the law being that if the money was not received by the firm, and the money was loaned to Ira Lackey personally, then the plaintiff cannot recover, although at the time of making such loans the plaintiff, as security for his loans, took from Ira Lackey a note or notes signed by Funk & Lackey." The modifications made by the court to instructions 4, 2, 5, and 7 did not correctly state the law. One partner has power to borrow money for partnership purposes, and give the notes of the firm therefor. Walsh *v.* Lennon, 98 Ill. 27. But he cannot bind the firm of which he is a member by giving the firm note in satisfaction of, or as security for, his personal indebtedness. Wittram *v.* Van Wormer, 44 Ill. 525; Wright *v.* Brosseau, 73 Ill. 381. And in Watt *v.* Kirby, 15 Ill. 200, this court said that where the credit is originally given to one partner the creditor cannot hold the other partners liable, although they may receive the benefit of the transaction; that the debt, being separate in its inception, does

not become joint by the subsequent application of the funds to the purposes of the partnership. We think, however, that, although the modification made by the court misstated the law, yet that it did not constitute reversible error. This court has decided in numerous cases that a party cannot assign for error a ruling made at his own instance, and has no right to complain of an error in an instruction when like error appears in an instruction given at his request. Coal Co. *v.* Haenni, 146 Ill. 614; 35 N. E. 162, and cases there cited. Here it was not at the instance of appellee that an unsound proposition of law was incorporated in the instructions, but it was on the motion of appellant himself that it was brought into the case. That which the court thereafter did of its own motion was simply to harmonize the instructions tendered by appellant. Appellant makes quite a plausible argument for the purpose of showing that the language in the instructions given at his instance, i. e., "that the firm of Funk & Lackey actually received the money," and "that Funk & Lackey received the money," have reference only to the original reception of the money from Babbitt at the time of the loans; whereas the language of the modifications made by the court, i. e., "that the firm of Funk & Lackey did in fact receive and use the money," are broader, and include, not only the case of an original reception of the money by the firm from Babbitt, but also the case of a receiving by the firm from Lackey subsequent to an original reception of the same from Babbitt by Lackey, acting in his individual capacity, and not as agent of the firm. The state of the case was this: The testimony introduced by appellee tended to prove, among other things, that the money borrowed from Babbitt, although not entered on the firm books, was actually used for firm purposes,— in paying firm indebtedness, etc.,— while the testimony introduced by appellant tended to prove, inter alia, that the borrowed money could not be traced on the books, or to any use for firm purposes, and that it was appropriated to the personal and individual use of Lackey. It is to be noted that the instructions proffered by appellant did not use any such expressions as "actually received the money in the first instance," or "original reception of the money from Babbitt," or "subsequent reception of the money by the firm from Lackey." They simply called the attention of the jury to this question, — whether or not there had been an actual reception of the money by the firm,— and left it wholly a matter of indifference whether such receiving of the money by the firm was from Babbitt, and at the time of the loans, or subsequent to the original loans, and from Lackey. The office of an instruction is to give knowledge and information to the jury, for immediate application to the subject-matter before them. The test, then, is, not what the ingenuity of counsel can, at leisure, work out the instructions to mean, but how and in what sense, under the evidence before them, and the circumstances of the trial, would ordinary men and jurors understand the instructions. We think

that in the light of the testimony above referred to the jury, when they were told in the instructions given at the request of appellant that they should pass upon the questions " whether the firm of Funk & Lackey actually received the money," and whether " Funk & Lackey received the money,"— their attention not being called to either the inquiry as to when it was received, whether at the time of the loan or thereafter, or to the inquiry whether it was received from Babbitt or from Lackey,— would understand that it was immaterial from whom, or at what time, the money was received, provided only that the result was that the firm got the money and the benefit thereof. We find no error in the record for which the judgment should be reversed. The judgment of the appellate court is affirmed. Affirmed.

Fictitious Payee — Effect on Rights of Holder.

Armstrong *v.* Pomeroy Nat. Bank, 46 Ohio St. 512 (22 N. E. 866).

MINSHALL, C. J. The original action was a suit by Kate S. D. Armstrong against the Pomeroy National Bank, to recover of the bank the sum of $450, due her upon a deposit she had made with the bank. She averred that she had given a check, payable to one William Brown or order, that had been procured from her by the fraudulent practices of one Grimes, who represented himself as acting for the said Brown in the negotiation of a note; that there was no such person as Brown, and that the note was fraudulent, of all which she was ignorant at the time; that Grimes afterwards indorsed the check " William Brown," and, adding his own indorsement, presented it to the bank, who paid it. The principal ground of defense was that plaintiff was negligent in delivering the check to Grimes, and that it used ordinary care in paying it to Grimes, indorsed as it was. The case was tried to the court, who, upon the request of the parties, found its conclusions of law and fact separately, as follows:—

" FINDINGS OF FACTS.

" (1) That the defendant is a banking corporation, organized under the laws of the United States. (2) That on August 31, A. D. 1882, plaintiff had on deposit with defendant, subject to be drawn out by her check, a sum of money greater than the amount of the check hereinafter to be described. (3) That on said 31st day of August, A. D. 1882, one J. S. Grimes, by a fraud practiced upon plaintiff, by negotiating to her, as the pretended agent of one William Brown, a fictitious person, a forged promissory note negotiable in form, induced her to draw and deliver to him, as pretended agent of said Brown, the following check: ' Pomeroy, O., August 31, 1882. Pomeroy National Bank, pay to William Brown or order, four hundred and fifty dollars ($450). [Signed] K. S. D. Armstrong." (4) That there was no such person as the above-named William Brown;

that plaintiff supposed (at the time) there was, and believed she delivered the check to said Brown, through his agent, said Grimes. (5) That she was not careless or negligent respecting the transaction, but, instead, was ordinarily careful and prudent in respect thereof. (6) That said Grimes on the same day (August 31, 1882), wrote the name 'William Brown' across the back of said check, and presented it to defendant for payment; that defendant having no knowledge respecting the way Grimes had obtained it, or that the name 'William Brown' was the name of a fictitious person, paid the same, and charged the amount thereof against the account of the plaintiff. (7) That defendant in paying the check to Grimes made the usual inquiries respecting his identity, and in other respects was ordinarily careful and prudent in relation to the transaction. (8) That plaintiff before the commencement of this action demanded of defendant the payment of said sum by it paid to said Grimes, which defendant then refused, and has not, either before or since said demand, paid the same, or any part thereof.

"CONCLUSION OF LAW.

"That the payment of the check by defendant to said Grimes was not (by the facts above found) authorized by said plaintiff, and could not legally be made a charge against her in the account between her and the defendant respecting the money she had on deposit with it, and that the amount named in the check, together with interest thereon at the rate of six per cent from the day she made the demand above found to have been made, for its payment to her, is due and payable from defendant to her."

A motion for a new trial having been made and overruled, judgment was entered for the plaintiff upon the findings. The judgment of the common pleas was reversed on error by the circuit court, and this proceeding is prosecuted to obtain a reversal of the circuit court, and an affirmance of the common pleas.

This case is, in its general features, analogous to that of Dodge *v.* Bank, 20 Ohio St. 234, and should, as we think, be ruled by it. There a paymaster of the United States, who kept his account at the bank, drew his check on the bank in payment of an indebtedness of the United States to Frederick B. Dodge, and delivered it to the person who presented the certificate, he representing himself to be Dodge. This representation was false, and the person making it was a thief. Being a stranger to the paymaster, he at first refused to pay the claim to him, but on his assuring him that he could identify himself at the bank, the paymaster drew the check, payable to Dodge or order, and delivered it to the person presenting the certificate. The amount of the check was paid him by the bank on his representing himself to be Dodge, and indorsing the check in that name. The bank had no knowledge of what had transpired prior to the presentation of the check for payment, and supposed it was paying it to the right person. In deciding the case, the court laid down the following

principles: (1) The duty of a banker is to pay the checks and bills of his customer, drawn payable to order, to the person who becomes holder by a genuine indorsement; and he cannot charge him with payments made otherwise, unless the circumstances amount to a direction from the customer to the banker to pay the paper without reference to the genuineness of the indorsements, or are equivalent to a subsequent admission that the indorsement is genuine, in reliance on which the banker is induced to alter his position. (2) When there is no fraud, or special understanding between the banker and the customer, the liability of the banker for paying a check upon a forged indorsement cannot be affected by conduct of the customer in drawing the check, of which the banker had no notice. The case was again brought to this court upon a question of evidence, and was assigned to and disposed of by the first commission, which, after a full and careful re-examination, approved and followed the former decision; and the principles announced in the case, after such careful consideration, must determine this one.

By the fraud of one Grimes the plaintiff was induced to purchase a note that had no real existence as a security. She is found by the court to have been ordinarily careful and prudent in the transaction, but was deceived. She supposed that she was purchasing a valid security belonging to a man, as represented by Grimes, by the name of William Brown, and for whom, as he represented, he was acting as agent, and gave to the assumed agent for Brown a check for the amount, payable to Brown or his order. Now it is evident both upon reason and the authority of the previous decisions, that the circumstances under which the plaintiff was induced to give the check, even though calculated to arouse suspicion on her part, cannot modify the duty required of the bank in the matter of paying or not paying the check. It is not claimed that the bank had any knowledge of how or under what circumstances Grimes had obtained the check, and there is no finding of any such course of dealing between the bank and the plaintiff as would have authorized it to depart from the general duty of a bank in paying the checks of its customers drawn payable to a certain person or order. It was its duty to pay to the person named or his order, and to withhold payment until it was satisfied, both as to the identity of the payee and the genuineness of his signature. Morse Bank., § 474; Robarts *v.* Tucker, 16 Q. B. 560, per Maule, J., at p. 578. It is found that the bank made the usual inquiries respecting the identity of Grimes, and in other respects was ordinarily careful and prudent in relation to the transaction; but this must be taken in connection with the further fact that Grimes was not the payee of the check, and that his indorsement, without the genuine indorsement of the payee, could confer no title upon the holder of the check, or any interest in it, as against the drawer. "There is no doubt," says Lord Kenyon in Tatlock *v.* Harris, 3 Term. R. 181, "but that the indorsee of a bill of exchange, payable to order,

must, in deriving his title, prove the handwriting of the first indorser." See Mead *v.* Young, 4 Term R. 28, 30; 2 Pars. Notes & B. 595. The indorsement on the check, purporting to be that of the payee, Brown, had been placed there by Grimes, and was either a forgery or a fraud, and, for the purposes of this case, it is not material which it is termed. As to it the bank acted upon the representations of Grimes, and did not otherwise know whether it was genuine or not. As said in Dodge *v.* Bank, 30 Ohio St. 1: "The rightful possession of a check by no means carries with it or implies a right to demand or receive payment of it, without the genuine indorsement of the person to whose order it is made payable;" and if a banker accept or undertake to pay a check, "he must see to it, at his peril, that he pays according to the terms of the order, and to the party named therein, or to one holding it under the genuine indorsement of such payee. * * * And this is true whether the defendant exercised the degree of caution which bankers usually do in such cases or not. The question is, was the check paid to the party to whom, by its terms, it was made payable?" Therefore the court rightly concluded, as a question of law from the facts found, that the payment of the check by the defendant was not authorized by the plaintiff, and that it could not rightfully be charged to her account.

The fact that the check was made payable to a person who had no existence does not alter the rights of the plaintiff as against the bank, for she supposed that Brown was a real person, and intended that payment should be made to such person. The doctrine that treats a check or bill made payable to a fictitious person as one made payable to bearer, and so negotiable without indorsement, applies only where it is so drawn with the knowledge of the parties. Tatlock *v.* Harris, 3 Term R. 174, 180; Vere *v.* Lewis, Id. 182; Minet *v.* Gibson, Id. 481; same case in the house of lords on error, Gibson *v.* Minet, 1 H. Bl. 569; Collis *v.* Emett, Id. 313; Gibson *v.* Hunter, 2 H. Bl. 187. The doctrine that a bill payable to a fictitious person or order is equivalent to one payable to bearer had its origin in these cases, which all grew out of bills drawn by Levisay & Co., bankrupts, payable to a fictitious person or order, and were accepted by Gibson & Co.; but it will be noticed that the holding in each case was upon the express ground that the acceptor knew at the time of his acceptance that the bill was payable to a fictitious person, and but for this fact the fictitious indorsement would have been held to be a forgery,— some of the judges expressing a doubt whether it was not so, although its character was known to the acceptor. 3 Term R. 181. These cases will be found reviewed in a note to Bennett *v.* Farnell, 1 Camp. 130. It was held in this case that a bill made payable to a fictitious person or order is neither payable to the order of the drawer or bearer, but is completely void. But in an *addendum* to the case, at page 180*c* of the Report, Lord Ellenborough observes that this holding must be taken with

this qualification: "Unless it can be shown that the circumstance of the payee being a fictitious person was known to the acceptor." The rule is stated with this qualification in Byles on Bills, 82. See, also, to the same effect, Forbes *v.* Espy, 21 Ohio St. 483; 1 Rand. Com. Paper, §§ 162–164; 2 Pars. Notes & B. 591, and note *a*. Mr. Daniels, in his work on Negotiable Instruments (section 139), states the rule to be general, but, as shown by Mr. Randolph, the cases do not bear out the text. 1 Rand. Com. Paper, § 164, note 4. And upon principle we do not see how the law could be held to be otherwise. For if the fictitious character of the payee is unknown to the drawer, whoever indorses the paper in that name with intent to defraud perpetrates a forgery, and the indorsement is void; a general intent to defraud being sufficient to constitute the offense.

The case of Lane *v.* Krekle, 22 Iowa, 399, is not in point, for there the note was made payable to a fictitious person "or bearer," and passed by delivery without indorsement. The case of Phillips *v.* Thurn, 114 E. C. L. 694, cited by the learned judge, is clearly distinguishable from the case before us. There the signature of the drawer as well as the indorsement was a forgery; but the defendant, the acceptor, was held liable because the plaintiff discounted the paper, relying in good faith upon the acceptance of the defendant. The case was finally disposed of on a case stated, reported in L. R. 1 C. P. 463. The ground of the decision appears from the following observations of Keating, J. (page 472): "I think, upon the facts stated in this special case, that it was not competent to the defendant to deny the genuineness of this bill. He knew that the plaintiffs were willing to advance money upon the bill only upon his vouching by his acceptance of it the authenticity of the drawing. His acceptance amounted to a representation to the plaintiffs which enabled the person representing Plana to obtain money from the plaintiffs on the bill." The decision in this case simply followed a well-recognized principle in the law of notes and bills. It is thus stated by Mr. Smith: "If the drawer's signature be forged, the drawee, if he accepts the bill, is bound to pay it, provided it be in the hands of a holder *bona fide* and for value, for the drawee's acceptance admits the drawer's handwriting to be genuine." Smith Merc. Law, 151. Now, Mrs. Armstrong can in no way be said to have affirmed by any act of hers that the indorsement upon the check was genuine, for there was no indorsement on it when it left her hands. The case of Rogers *v.* Ware, 2 Neb. 29, cited by counsel for defendant in error, does not support his contention. The case of Ort *v.* Fowler, 31 Kan. 478, 2 Pac. Rep. 580, was rested upon a number of grounds; and, in so far as it may have been on the ground that a note made payable to a fictitious person or order is in effect payable to bearer, irrespective of the knowledge of the maker, it simply follows the authority of 1 Daniels Neg. Inst., § 139, which, we have shown, is not borne out by the cases relied on.

If the drawer of a check, acting in good faith, makes it payable to a certain person or order, supposing there is such person, when in fact there is none, no good reason can be perceived why the banker should be excused if he pay the check to a fraudulent holder upon any less precautions than if it had been made payable to a real person; in other words, why he should not be required to use the same precautions in the one case as in the other, — that is, determine whether the indorsement is a genuine one or not. The fact that the payee is a non-existing person does not increase the liability of the bank to be deceived by the indorsement. The fact is that an ordinarily prudent banker would be less liable to be deceived into a mistaken payment by a fictitious indorsement such as this was than by a simple forgery. The determination of the character of any indorsement involves the ascertainment of two things: (1) The identity of the indorser; and (2) the genuineness of his signature; and no careful banker would pay upon the faith of the genuineness of any name until he had fully satisfied himself both as to the identity of the person and the genuineness of his signature. Now, a careful banker may be deceived as to the signature of a person with whose identity he may be familiar; but he is less liable to be deceived when both the signature and the person whose signature it purports to be are unknown to him. In making the inquiry required in such case to warrant him in acting, he will either learn that there is no such person, or that no credible information can be obtained as to his existence, which, with an ordinarily prudent banker, would be the same as actual knowledge that there is no such person, and he would withhold payment, as he would have the right to do in such case. But still, if he should be deceived as to the existence of the person, he would, nevertheless, require to be satisfied as to the genuineness of the signature. Of this, however, he could not be through his skill in such matters, and on which bankers ordinarily rely, for he would be without any standard of comparison, and he could have no knowledge of the handwriting of the supposed person, for there is no such person. So that if he acts at all it must be upon the confidence he may place in the knowledge of some other person, and if he choose to act upon this, and make, instead of withholding, payment, he acts at his peril, and must sustain whatever loss may ensue. It is a saying, frequently repeated in "The Doctor and Student," that "he who loveth peril shall perish in it." In other words, where a person has a safe way, and abandons it for one of uncertainty, he can blame no one but himself if he meets with misfortune. Judgment of the circuit court reversed, and that of the common pleas affirmed.

What is a Sufficient Signature.

Brown *v.* The Butchers' and Drovers' Bank, 6 Hill, 443.

On error from the superior court of the city of New York, where the Butchers' and Drovers' Bank sued Brown as the indorser of a bill of exchange, and recovered judgment. The indorsement was made with a lead pencil, and in figures, thus, "1. 2. 8.," no name being written. Evidence was given strongly tending to show that the figures were in Brown's handwriting, and that he meant they should bind him as indorser, though it also appeared he could write. The court below charged the jury that, if they believed the figures upon the bill were made by Brown, as a substitute for his proper name, intending thereby to bind himself as indorser, he was liable. Exception. The jury found a verdict for the plaintiffs below, on which judgment was rendered, and Brown thereupon brought error.

Nelson, C. J. It has been expressly decided that an indorsement written in pencil is sufficient. Geary *v.* Physic, 5 Barn. & Cress. 234. And also that it may be made by a mark. George *v.* Surrey, 1 Mood & Malk. 516. In a recent case in the K. B. it was held that a mark was a good signing within the statute of frauds. And the court refused to allow an inquiry into the fact whether the party could write, saying that would make no difference. Baker *v.* Dening, 8 Adol. & Ellis, 94; and see Harrison *v.* Harrison, 8 Ves. 186; Addy *v.* Grix, Ib. 504.

These cases fully sustain the ruling of the court below. They show, I think, that a person may become bound by any mark or designation he thinks proper to adopt, provided it be used as a substitute for his name, and he intend to bind himself.

Judgment affirmed.

Effect of Blank in Statement of Amount of Money in Body of Instrument.

Witty *v.* Michigan Mut. L. Ins. Co., 123 Ind. 411 (24 N. E. 141).

Berkshire, J. This is an action brought by the appellee against the appellant on the following writing: "$147.70. Indianapolis, Ind., Nov. 28th, 1883. Four months after date I promise to pay to the order of the Michigan Mutual Life Insurnnce Company ——— dollars, and five per cent. attorney's fees thereon per annum from date until paid, value received, without relief from valuation or appraisement laws of the State of Indiana. The indorsers jointly and severally waive presentment for payment, protest and notice of protest, and non-payment of this note, and expressly agree, jointly and severally, that the holder may renew or extend the time of payment hereof from time to time, and receive interest, in advance or otherwise, from either of the makers or indorsers for any extension so made, without releasing them hereon. Negotiable and payable at ——,

J. B. Wittey. Nov. 28th—31—84. Indiana." The appellee in its complaint did not ask for a reformation of the instrument, but relied on it as a promissory note complete in itself. The appellant answered by the general denial only. The cause was submitted to the court at special term, and a finding made for the appellee. The appellant filed a motion for a new trial, which the court overruled, and he excepted. An appeal was taken to general term, and upon the errors assigned the judgment at special term was affirmed, and from the judgment in general term this appeal is prosecuted.

There is but one question presented for our consideration: Is the written instrument, as it appears in the record, an enforceable obligation? We are of the opinion that it is; if not so, otherwise, by virtue of section 5501, Rev. St. 1881, and is negotiable by indorsement. It is signed by the appellant, and, when taken as an entirety, we think it contains a promise to pay $147.70, together with 5 per cent. attorney's fees. By the very terms of the instrument the appellant obligates himself to pay to the appellee "dollars," and it is expressly recited that the promise rests upon a valuable consideration. No one can read the writing without at once coming to the conclusion that the appellant intended to obligate himself to the appellee for the payment of some definite amount of money, and that the appellee understood that it was receiving such an obligation. Though there may be some formal imperfections in the written obligation or contract which parties have entered into, if it contains matter sufficient to enable the court to ascertain the terms and conditions of the obligation or contract to which the parties intended to bind themselves, it is sufficient. In the language of Lord Campbell in Warrington *v.* Early, 2 El. & Bl. 763: "The contract must be collected from the four corners of the document, and no part of what appears there is to be excluded." We can imagine no good reason why the marginal figures upon the writing in question should be disregarded. We know, as a part of the commercial history of the country, that the universal practice has been, for a period so long that the memory of man runneth not to the contrary, to represent by superscription in figures upon all obligations for the payment of money the amount or sum which is written in the body of the instrument. The superscription is always intended to represent the amount found in the body of the instrument, and not a different amount. If, therefore, an obligation is found where there is a promise to pay "dollars," but the number of dollars in the body of the instrument is blank, and the margin of the instrument is found to contain a superscription which states a number of dollars, why, in view of the usage or custom which has so long prevailed, should the body of the instrument not be aided by the superscription? We think in such a case the figures found in the margin should be taken as the amount which the obligor intended to obligate himself to pay, and the obligation enforced accordingly.

We do not think in such a case that the courts would be justified in disregarding the evident intention of the parties, as indicated by the superscription upon the paper, and in holding the instrument void for uncertainty, or on the ground that it is not a perfect writing; and especially are we of the opinion stated in view of the liberal statute which we have on the subject of promissory notes and other written obligations, and their negotiation. Section 5501, *supra*. In the case under consideration, the action is between the original parties to the instrument, and upon it in the form and condition in which it was executed; and therefore we do not think it would be profitable to consider questions which might arise where the obligation is made payable at a bank, the blank number of dollars afterwards filled in by the payee, and indorsed by him to an innocent holder for value before maturity. As to whether the writing would be a negotiable instrument in its present condition but for our statute, we find some conflict of authority. We cite the following authorities for and against the proposition. For: Ives *v.* Bank, 2 Allen, 236; Sweetser *v.* French, 13 Metc. 262; Petty *v.* Fleishel, 31 Tex. 169; Corgan *v.* Frew, 39 Ill. 31; Williamson *v.* Smith, 1 Cold. 1. Against: Bank *v.* Hyde, 13 Conn. 279; Edw. Bills, 168; Hollen *v.* Davis, 59 Iowa, 444; 13 N. W. Rep. 413; 44 Amer. Rep. 688, with note.

We find no error in the record. Judgment affirmed, with costs.

Unconditional Written Promise or Order to Pay a Certain Sum of Money.

Hasbrook *v.* Palmer (Circuit Court of the United States, 1839), 2 McLean, 10.

OPINION OF THE COURT. This action is brought by the plaintiffs as assignees on a promissory note, payable at New York, in New York funds or their equivalent. The defendants demur specially, and for cause of demurrer state that it is not averred in said declaration of what value the said New York funds or their equivalent in the declaration were at the time and place of payment, and that said note is not negotiable.

The Michigan statute in regard to the negotiability of promissory notes is similar to the Statute of Anne, which has been generally adopted in this country. And the principal question under this demurrer is, whether the note on which this action is brought, being payable in New York funds or their equivalent, is negotiable.

The plaintiffs rely on the decision in the case of Keith *v.* Jones, 9 John. Rep. 120, where it was held that a note payable to A., or bearer, in "New York State bills or specie," was negotiable within the statute, upon the ground that the bills mentioned meant bank paper, which, in conformity with general usage and understanding, are regarded as cash; and, therefore, that the meaning was the same as if payable in lawful current money of

the State. And also on the case of Judah *v.* Harris, 19 John. Rep. 144, where it was decided that a promissory note, payable at a particular place, in the bank notes current in the city of New York, was negotiable within the statute.

And it is insisted that the promise to pay in New York funds, or their equivalent, is equivalent to an undertaking to pay in lawful current money of the State of New York. That it is generally understood that New York funds means specie, or a currency equal to specie, and that the drawer of the note promises, substantially, to pay in current New York money.

In support of the demurrer it is contended that to be negotiable a note must be for the payment of money only, and this is laid down in Chitty on Bills (ed. 1839), 152. He says it is the first and principal requisite, and is established by foreign as well as English law, that a bill or note must be for the payment of money only. That it cannot be for the delivery or payment of merchandise, or other things in their nature susceptible of deterioration and loss and variation in value; nor can it be for payment in good East India bonds or for the payment of money by a bill or note. Clarke *v.* Percival, 2 Bar. & Adol. 660; Bul. N. P. 272.

A promissory note not payable in cash or specific articles is not negotiable. Matthews *v.* Haughton, 2 Fairf. 377; Johnson *v.* Laird, 3 Blackf. Rep. 153.

A note payable to A. B., or order, in good merchantable whisky, at trade price, cannot be sued by an assignee or bearer in his own name. Rhodes *v.* Lindley, Ohio Rep. condensed, 465.

A note for a certain sum, payable to A. or order, "in foreign bills" (meaning thereby bills of country banks), has been held not to be a good promissory note within the statute, and consequently not negotiable. Jones *v.* Sales, 4 Mass. Rep. 245. In the case of Lieber and Colsin *v.* Goodrich, 5 Cowen Rep. 186, the court held a note payable in Pennsylvania or New York paper currency is not a promissory note for the payment of money within the statute. And in the case of McCormick *v.* Trotter, 10 Serg. & Raw. Rep. 94, the court decided that a promissory note payable to A. B., or order, for five hundred dollars, in notes of the chartered banks in Pennsylvania, was not a negotiable note on which the indorsee can sue in his own name.

In South Carolina it has been decided that paper medium is not money; and that, therefore, a note payable in paper medium is not assignable within the Statute of Anne and their Act; and on a verdict for the assignee of such a note judgment was arrested: Large *v.* Kohne, 1 McCord, 115; McElarin *v.* Nesbit, 2 Nott & McCord Rep. 519.

The cases cited in the 9th and 19th of John. Rep. seem not to be sustained by the current of decisions in this country and in England; and it is difficult to distinguish those cases from the decisions cited so as to maintain their consistency. If this, indeed, were practicable, it is not necessary to the decision of the question raised by this demurrer.

What is understood in this State by New York funds or their equivalent, may be a matter of doubt; nor does it seem to be of a nature which can be resolved by evidence, so far as regards the question under consideration.

The term New York funds, it is presumed, may embrace stocks, bank notes, specie, and every description of currency which is used in commercial transactions. But whether is meant the funds of the State generally or of the city of New York is not clear. The presumption is in favor of the latter, but this is by no means certain. In this respect, as well as what constitutes New York funds, the face of the note is indefinite. It is, indeed, susceptible of different interpretations, and for this reason it cannot be considered a negotiable instrument within the statute. It is not a note, in the language of the decisions, payable in money. It is payable in New York funds or their equivalent.

Now what is equivalent to New York funds? The answer is their value, their value in specie or in current paper which passes at a discount. Might not the drawer pay this note in this description of paper, making up the discount? Would not this, in the language of the contract, be equivalent to New York funds? It would be equivalent if of equal value.

The demurrer must be sustained.

Stipulation for Attorney's Fee does not Destroy Negotiability.

Dorsey *v.* Wolff, 142 Ill. 589 (32 N. E. 495).

MAGRUDER, J. This is an action of *assumpsit* begun in the circuit court of Macoupin county on May 16, 1889, by Marcus A. Wolff against the appellant, Dorsey, to recover, as attorney's fees, the sum of 10 per cent upon the amount found to be due upon the promissory notes hereinafter mentioned, in a suit theretofore brought upon said notes. The defendant demurred to the declaration. The demurrer was overruled. The defendant excepted to the order overruling the demurrer, and elected to stand by his demurrer. Thereupon plaintiff's damages were assessed at $1,619, and judgment was rendered in his favor for that amount. The judgment has been affirmed by the appellate court, from which latter court the case is brought here by appeal.

The declaration sets up three notes, executed by the defendant, William M. Dorsey, dated December 31, 1885, payable to the order of George W. Belt, at the banking house of Belt Bros. & Co., in Bunker Hill, Ill., — the first for $13,586 84, on or before two years after date; the second for $543.47, on or before eighteen months after date; and the third for $543.47, on or before two years after date,— each of which notes, after the maker promises for value received to pay the amount therein named to the order of said Belt, contains the following words: "With eight per cent interest per annum after maturity, and, if not paid when

due and suit is brought thereon, then we promise o pay ten per cent on the amount due hereon in addition as an attorney's fee, and to be recovered as part of this note, or by separate suit." By the terms of each note, also, the makers and indorsees waive presentment for payment, protest, and notice, etc. The declaration then avers that Dorsey delivered said notes to Belt, and Belt indorsed the same to plaintiff, etc.; that said notes were not paid when due; that suit was brought thereon; that the said 10 per cent was not paid before or after said suit was brought, and was not recovered in said suit so brought upon said notes as a part thereof, etc. One of the counts, in addition to the foregoing averments, alleges that, after the maturity of the notes, they were placed in the hands of an attorney for suit; that suit was brought thereon, and, the 10 per cent attorney's fee not having been recovered therein, the plaintiff, before the bringing of the present suit, paid his attorney for his services in said former suit the said sum of $1,619.20.

The main question presented by the assignments of error is whether or not the notes described in the declaration are negotiable instruments. It is claimed by the appellant that the notes are made non-negotiable by the insertion therein of the written promise of the maker that, if they were not paid when due and suit was brought thereon, he would pay 10 per cent on the amount due thereon in addition, as an attorney's fee, and to be recovered as a part of the notes, or by separate suit; that the indorsements by the payee did not confer the right upon the indorsee to bring suit in his own name upon the notes; that, even if such indorsements should be held to have conferred upon the assignee the right to bring suit upon the notes in his own name, it did not confer upon such assignee the right to bring a separate suit upon the stipulations or promises as to the attorney's fees.

Various definitions have been given of a "promissory note." In general terms, it may be defined to be a written promise by one person to pay to another person therein named or order a fixed sum of money, at all events, and at a time specified therein, or at a time which must certainly arrive. Lowe *v.* Bliss, 24 Ill. 168; Chicago Ry. Equipment Co. *v.* Merchants' Bank, 136 U. S. 268; 10 Sup. Ct. Rep. 999; Story Prom. Notes, p. 2; 3 Kent Comm. 74; 2 Amer. & Eng. Enc. Law, p. 314. A note is none the less negotiable because it is made payable on or before a named date. Chicago Ry. Equipment Co. *v.* Merchants' Bank, supra; Cisne *v.* Chidester, 85 Ill. 523; Ernst *v.* Steckman, 74 Pa. St. 13. An instrument for a specified sum of money, and also for the payment of something else, the value of which is not ascertained, but depends upon extrinsic evidence, is not a note. Lowe *v.* Bliss, supra. A note which provides for the payment, after the maturity thereof, of a certain rate of interest per annum, not exceeding the legal rate, is not made conditional by such provision. Houghton *v.* Francis, 29 Ill. 244; Reeves *v.* Stipp, 91 Ill. 609; Laird *v.* Warren, 92 Ill. 204.

Applying these definitions to the notes mentioned in the declaration in this case, we find that each note is "a note for a sum certain, payable at a fixed date." Dietrich *v.* Bayhi, 23 La. Ann. 767. The notes are not payable on a contingency, because the maker has the option of paying on or before a certain date; nor are they conditional instruments because they contain the words, "with eight per cent interest per annum after maturity." The portion of each note which precedes the stipulation or promise as to the attorney's fee is in itself a complete promissory note. For example, the part of the first note that goes before the provision for the fee is as follows: "$13,586.84. Bunker Hill, Ills., Dec. 31st, 1885. On or before two years after date, for value received, we or either of us promise to pay to the order of George W. Belt, thirteen thousand five hundred eighty-six and 84-100 dollars, payable at the banking house of Belt Bros. & Co., in Bunker Hill, Illinois, with eight per cent interest per annum after maturity," etc. "Here the sum, time of payment, and payee are certain, and these are the essential characteristics of a promissory note." Houghton *v.* Francis, supra. The promise to pay the attorney's fee is a promise to do something after the note matures. It does not affect the character of the note before or up to the time of its maturity, either as to certainty in the amount to be paid, or fixedness in the date of payment, or definiteness in the description of the person to whom the payment is to be made. The stipulation or promise as to the attorney's fee cannot, therefore, affect the negotiability of the note, because the negotiability of a promissory note is, for all practical purposes, at an end when it matures. Parties taking it after its maturity cannot claim to be innocent holders without notice of defenses which may be set up by the maker against its collection. If the stipulation for an attorney's fee is of such a character as to make the amount to be paid at maturity uncertain or indefinite, the note cannot be regarded as negotiable so as to authorize a suit upon it by the indorsee; but, where the stipulation does not have such an effect, its insertion in the note does not destroy the negotiability of the note.

When the amount to be paid at maturity is certain and fixed, the maker knows what he is to pay, and the holder knows what he is to receive, from the face of the note itself. Commercial paper is expected to be paid promptly when it is due. A stipulation for an attorney's fee, which is only to be recovered if the note is not paid when due and suit is brought upon it, can have no force except upon the maker's default. If he keeps his contract by paying his note at its maturity, he will not be obliged to pay the additional amount; and no element of uncertainty enters into the contract. By the stipulation, the maker offers to the holder an assurance of his own confidence in his ability to pay without suit, and thereby adds to the value of the paper as promising less expense in its collection. It has been said that "the additional agreement relates rather to the remedy upon the note, if a legal remedy be pursued, than to the sum which the maker is bound

to pay; and that it is not different in its character from a *cognovit*, which, when attached to promissory notes, does not destroy their negotiability.'' Daniel Neg. Inst. (4th ed.), §§ 62, 62*a*. We do not think that the negotiability of the notes in this case was destroyed by the stipulations therein as to attorneys' fees.

The view here expressed is sustained by the authorities. In Nickerson *v.* Sheldon, 33 Ill. 372, the note contained this provision: ''And we further agree, if the above note is not paid without suit, to pay ten dollars, in addition to the above, for attorneys' fees.'' In that case the plaintiff did not declare for the $10, and hence the recovery was only for the principal and interest due on the note, but we held the note to be negotiable under the statute, and said: ''The amount due by this note is absolutely certain, and it possesses all the requisites of a negotiable instrument under the statute. Stewart *v.* Smith, 28 Ill. 397. There is no uncertainty as to the precise sum of money to be paid on the maturity of the note. Bane *v.* Gridley, 67 Ill. 388; Gobble *v.* Linder, 76 Ill. 157; Barton *v.* Bank, 122 Ill. 352; 13 N. E. Rep. 503.'' In Stoneman *v.* Pyle, 35 Ind. 103, the note contained a stipulation for the payment of attorneys' fees should suit be instituted thereon, and it was said: ''We see no reason, on principle or authority, or on grounds of public policy, for holding that such a stipulation destroys the commercial character of paper otherwise having that character. * * * So here the defendant had the right to pay the face of the note when due, and avoid the attorneys' fees. As long as the note retained the peculiar characteristics of commercial paper, viz., up to the time of its maturity and dishonor, the amount to be paid on the one hand, and recovered on the other, was fixed and definite.'' Smock *v.* Ripley, 62 Ind. 81. In Gaar *v.* Banking Co., 11 Bush, 180, there was indorsed upon the back of an accepted bill of exchange an agreement by the drawers, indorsers, and acceptors thereof ''to pay a reasonable attorney's fee to any holder thereof if the same shall thereafter be sued upon, and also pay interest at the rate of ten per cent per annum after maturity until paid;'' and it was claimed that the written agreement so indorsed upon the bill destroyed its negotiability on the ground that the amount of the attorney's fee was not ascertained, and hence that the bill was for an uncertain amount; but the court held otherwise, and said: ''The amount to be paid at maturity was fixed and certain, and it was only in the event that the bill was not paid when due that any uncertainty arose. The reason that the rule that the amount to be paid must be fixed and certain is that the paper is to become a substitute for money, and this it cannot be, unless it can be ascertained from it exactly how much money it represents. As long, therefore, as it remains a substitute for money, the amount which it entitles the holder to demand must be fixed and certain; but when it is past due it ceases to have that peculiar quality denominated 'negotiability' or to perform the office of money; and hence anything which only renders its amount uncer-

tain after it has ceased to be a substitute for money, but which in nowise affected it until after it had performed its office, cannot prevent it becoming negotiable paper." In Seaton *v.* Scovill, 18 Kan. 433, a note for the payment of a certain sum, "with interest at twelve per cent per annum after due until paid, also costs of collecting, including reasonable attorneys' fees if suit be instituted on this note," was held to be negotiable; and Mr. Justice Brewer, delivering the opinion of the court, quoted with approval the above extract from the Kentucky case, and said: "The amount due at the maturity of the paper is certain; and the only uncertainty is in the amount which shall be collectible in case the maker defaults, at the maturity of the paper, in his promise to pay, and the holder is driven to the necessity of instituting a suit for collection, and then only as to the expenses of such collection." In Sperry *v.* Horr, 32 Iowa, 184, each of the notes sued upon was for a certain sum, and contained the following words: "With ten per cent interest until paid; if not paid when due, and suit is brought; thereon, I hereby agree to pay collection and attorneys' fees therefor;" and the court held them to be negotiable, saying the attorneys' fees are not part of the sums due on the notes, but are an amount for which the maker may become liable when a legal remedy is enforced against him. Shugart *v.* Pattee, 37 Iowa, 422; Bank *v.* Breese, 39 Iowa, 640; Howenstein *v.* Barnes, 5 Dill. 482; Schlesinger *v.* Arline, 31 Fed. Rep. 648; Sewing Mach. Co. *v.* Moreno, 6 Sawy. 35; 7 Fed. Rep. 806.

Inasmuch as the note is negotiable, and passes by indorsement to the assignee, the agreement as to the attorney's fee also passes to such assignee as a part of the note. The stipulation or promise to pay the attorney's fee is not made with the payee alone. The note is payable to the payee or order. The promise is as much to the holder as to the original payee. The fee is to be paid if the note is not paid when due, whether it is then owned by the payee or by any other holder. Moreover, the attorney's fee is an incident to the main debt and passes with it. Bank *v.* Ellis, 2 Fed. Rep. 44; 2 Daniel Neg. Inst., § 62*a*; Adams *v.* Addington, 16 Fed. Rep. 89. The promise to pay it, thereby lessening the cost of collection in case of suit, gives the note currency as well as security, and is regarded as a provision for the indorsee or holder as well as for the payee. Bank *v.* Ellis, 6 Sawy. 96; 2 Fed. Rep. 44. Daniel, in his work on Negotiable Instruments (volume 2, § 62*a*), says: "When the added stipulation is deemed valid, and the bill or note negotiable, such stipulation becomes a part of the acceptor's or indorser's contract, and need not be sued for by the attorney, but it is recoverable by the holder of the instrument." See cases cited in note 3.

A further question arises as to the mode of enforcing the collection of the fee. It is said that it cannot be recovered in a separate suit if it is not embraced in the recovery on the note. Such seems to be the doctrine in Indiana. Smiley *v.* Meir, 47 Ind.

559. In a case in Iowa, also, where the note sued on contained a stipulation "to pay, in addition to the amount thereof, fifteen dollars attorneys' fees if the note is collected by suit," it was held not to be the intention of the parties that the fee should become due only after the note was collected by suit, but to be their intention that the fee should be recoverable with the amount of the note. Shugart *v.* Pattee, 37 Iowa, 422. In this State it has been held that the fee is not due when the suit is brought on the note, and therefore cannot be included in the assessment of damages. Nickerson *v.* Babcock, 29 Ill. 497; Easter *v.* Boyd, 79 Ill. 325. In the two cases, however, in which this court so held, there was no express agreement in the note that the fee might be recovered in a separate suit. Nickerson *v.* Babcock, supra; Easter *v.* Boyd, supra. In the case at bar, the promise is "to pay ten per cent on the amount due hereon in addition as an attorney's fee, and to be recovered as a part of this note or by separate suit." Whether or not a stipulation to pay the fee to be recovered as a part of the note, in case suit is brought on it for its non-payment when due, is so far a mere incident to the main debt that a separate suit cannot be brought for the fee after the termination of the suit on the note is a question which is not presented by this record. We see no reason why the maker of the note may not stipulate that a separate suit may be brought for the fee, and why such stipulation cannot be enforced by the payee or the holder. If the written promise to pay the fee passes to the holder by the indorsement, the written agreement as to the mode of recovery also passes. The fact that the engagement to pay a fee is incidental and auxiliary to the main engagement to pay the debt does not prevent the maker of the note from agreeing to submit to a separate suit for the recovery of the fee. We are therefore of the opinion that the present suit is properly brought.

It is further claimed that the agreement to pay the 10 per cent as a fee is usurious. The authorities above referred to hold to the contrary. Stoneman *v.* Pyle, supra; Sewing Mach. Co. *v.* Moreno, supra. See, also, 2 Pars. Notes & B., pp. 413, 414; Clawson *v.* Munson, 55 Ill. 394; Barton *v.* Bank, 122 Ill. 352; 13 N. E. Rep. 503. There is here no violation of the usury law, because the agreement "provides for new or additional compensation or interest for the use of the money because of the failure to pay at maturity. It is not in the nature of a contract for additional interest, but a provision merely against loss or damage to the payee (or holder) specifically pointed out." Barton *v.* Bank, *supra*. There is nothing to show that 10 per cent on the amount due is an unreasonable fee. The defendant stood by his demurrer to the declaration, which described the notes, and the provision therein for a fee of 10 per cent. The declaration must therefore be regarded as alleging, in substance, that a reasonable attorney's fee was 10 per cent on the amount due on the notes. Smiley *v.* Meir, supra. The judgment of the appellate court is affirmed.

Effect of Seal on Negotiability.

Brown *v.* Jordhal, 32 Minn. 135 (19 N. W. 650).

Plaintiff brought this action as holder of the following instrument, having brought it in good faith for value, in the usual course of business, before maturity, and without notice of any defense to it:—

"$120. TOWNSHIP OF MANCHESTER, Feb. 23, 1881.

"Six months after date (or before, if made out of the sale of Drake's horse, hay, fork and hay-carrier) I promise to pay James B. Drake, or bearer, one hundred and twenty dollars.

"Negotiable and payable at the Freeborn County Bank, Albert Lee, Minn., with ten per cent interest after maturity until paid.

"OLE J. JORDHAL. [SEAL]

"*Witness:* J. WILLIAMSON." [SEAL]

Plaintiff admitted on the trial that the note was obtained from defendant by fraud, and that as between the original parties it was without consideration and fraudulent. The court thereupon directed a verdict for defendant; a new trial was denied, and defendant appealed.

GILFILLAN, C. J. The defendant executed an instrument in the form of a negotiable promissory note, except that after and opposite the signature were brackets, and between them the word "seal," thus "[Seal.]" The question in the case is, is this a negotiable promissory note, so as to be entitled to the peculiar privileges and immunities accorded to commercial paper? The rule that an instrument under seal, though otherwise in the form of a promissory note, is not (certainly when executed by a natural person, however it may be when executed by a corporation) a negotiable note, entitled to such privileges and immunities, is universally recognized, and is not disputed in this State. But the appellant contends that merely placing upon an instrument a scroll or device, such as the statute allows as a substitute for a common-law seal, without any recognition of it as a seal in the body of the instrument, does not make it a sealed instrument. Undoubtedly where there is a scroll or device upon an instrument, there must be something upon the instrument to show that the scroll or device was intended for and used as a seal. The scroll or device does not necessarily, as does a common-law seal, establish its own character. Such words in the *testimonium* clause as "witness my hand and seal," or "sealed with my seal," would establish that the scroll or device was used as a seal. No such reference in the body of the instrument was necessary in the case of a common-law seal. Goddard's Case, 2 Coke Rep. 5 a; 7 Bac. Abr. (Bouvier's ed.) 244. Nor is there any reason to require it in the case of the statutory substitute, if the instrument anywhere shows clearly that the device was used as and intended for a seal. It would be difficult to conceive how the party could express that

the device was intended for a seal more clearly than by the word "seal," placed within and made a part of it. This was an instrument under seal. Order affirmed.

Bill or Note Delivered in Escrow — Right of Bona Fide Holder and Obligors.

Riggs *v.* Trees, 120 Ind. 402 (22 N. E. 254).

Elliott, C. J. The appellants were partners, doing business as real-estate brokers. Swain employed them to sell his farm, and they did sell it to the appellee for $4,000. As part of the purchase price the appellee assumed and agreed to pay the principal, but not the interest, of a mortgage executed to an insurance company to secure $1,800. A like amount was paid in cash, and a note for the remainder was executed by the appellee, and to secure its payment he executed a mortgage upon the land bought of Swain. The note was payable in bank, and was placed in the hands of the appellants. By the terms of the contract between the parties the note was to be held by the appellants until an abstract of title was furnished to the appellee, and all liens against the land paid and discharged. The note was not placed in the hands of the appellants for the purpose of passing the title to it, but for the purpose of delivering it to Swain, and closing the sale as soon as he had complied with his agreement and paid the liens on the land. The appellants, nothwithstanding their agreement to retain possession of the note and mortgage, delivered them, without the consent of the appellee, to Swain. The note was transferred by indorsement to a person for a valuable consideration, before maturity, and the indorsee received it without notice of any defense. At the time the contract of sale was made there were liens on the lands to the amount of $108 above the amount of the incumbrance assumed by the appellee. Swain is insolvent, and is not a resident of the State.

The appellee could not have successfully defended against the note in the hands of the indorsee, for it was by his act that the appellants were enabled to put the note in circulation, and he must suffer rather than the innocent third person. The principle which rules here is the same as that which prevailed in Quick *v.* Milligan, 108 Ind. 419; 9 N. E. Rep. 392. One who places in another's hands his promissory note, perfect in all its parts, cannot defeat the note in the hands of a *bona fide* holder. The rule, indeed, in cases of promissory notes negotiable under the law-merchant, extends much further, but we need do no more than apply the principle we have indicated as the governing one, although a much broader rule might be applied. The appellants violated their contract, and must respond in damages. It is no defense for them to assert that in law the delivery to them was absolute, and transferred title to Swain at once; for, whatever may be the rule

as between payor and payee, it is quite clear that the appellants, having agreed to retain the note, were bound to keep their contract. The assumption that the appellants were the agents of Swain is unfounded, for they undertook to retain the notes under an agreement with the appellee, and not as Swain's agent. But if they had received the notes as the agents of Swain they had no right to violate their agreement with the appellee. If Swain himself had made such an agreement, and it was properly evidenced by writing, he would have no right to violate it. Judgment affirmed, with 10 per cent damages and costs.

CHAPTER III.

AGREEMENTS CONTROLLING THE OPERATION OF BILLS AND NOTES.

SECTION 29. Kinds of agreements.
30. What memoranda will control.
31. Collateral agreements.
32. Agreements to renew.

§ 29. **Kinds of agreements.**— Agreements, which are intended to control the operation of bills and notes, are of two principal kinds, viz.: memoranda on the face or back of the instruments, and collateral or independent agreements. The principal legal difference between the two kinds lies in the fact, that the memorandum when inscribed on the bill or note, will furnish actual or constructive notice of itself to all subsequent holders, and hence will control the operation or character of the instrument, into whosesoever hands it may fall.[1] Whereas, collateral agreements can only control the operation of the instrument as to those parties to it, who have received actual notice of their existence. There can be no constructive notice of such an agreement, for nothing appears in the body of the bill or note.

§ 30. **What memoranda will control.**— Not every memorandum will be held to be a part of a bill or note; only those which by their terms are evidently designed to, and actually do, affect their character, and control the operation of the instrument. If the memorandum is of such content that it could only have been intended as an aid to the memory of the holder or maker, to identify the instrument itself, or its source and consideration; or where the memo-

[1] Perry *v.* Bigelow, 128 Mass. 129; Wait *v.* Pomeroy, 20 Mich. 425 (4 Am. Rep. 345); Zimmerman *v.* Rote, 75 Pa. St. 188; Farmers' Bank *v.* Ewing, 78 Ky. 264 (39 Am. Rep. 231).

randum is a direction to the holder's own agents what to do with it, it will not become an integral part of the bill or note, and can therefore not change or alter its character.[1] Nor can the memorandum be treated as a part of the bill or note, where it is so ambiguous and repugnant to the other contents, that parol evidence is necessary to explain its import; or where the agreement is repugnant to the assignment or transfer of the instrument.[2] But with these limitations, any memorandum, written in any part of the bill or note, will constitute a part of it, and control its operation. Thus, memoranda have been held to be a part of a note or bill, which impose conditions precedent to the obligation to pay,[3] which stipulate a place of payment,[4] a waiver of presentment, notice and protest,[5] or which provides that the note is given as security[6] or stipulate time of payment, even though it makes the time uncertain or conditional, and thus destroys the negotiability of the paper.[7] Memoranda may also control the note or bill, where they provide for payment in a particular kind of money or currency.[8] If the memorandum is made contemporaneously with the execution of the bill or note, it clearly becomes a constituent part of it; and it is always presumed that a

[1] Fitch *v.* Jones, 5 El. & B. 238; Benedict *v.* Cowden, 49 N. Y. 396 (10 Am. Rep. 382).

[2] Way *v.* Batchelder, 129 Mass. 361 (repugnant as to time of payment); Leland *v.* Parriott, 35 Iowa, 454 (memorandum that note is not to be sold).

[3] Henry *v.* Colman, 5 Vt. 402; Cushing *v.* Fifield, 70 Me. 50 (35 Am. Rep. 293); Wait *v.* Pomeroy, 20 Mich. 425 (4 Am. Rep. 395).

[4] Tuckerman *v.* Hartwell, 3 Me. 147 (14 Am. Dec. 225); Woodworth *v.* Bk. of America, 19 Johns. 391 (10 Am. Dec. 239). But see, *contra*, Am. Nat. Bank *v.* Bangs, 42 Mo. 450 (97 Am. Dec. 349).

[5] Farmers' Bank *v.* Ewing, 78 Ky. 264 (39 Am. Rep. 231).

[6] Nat. Security Bank *v.* McDonald, 127 Mass. 82; Cholmley *v.* Darley, 14 M. & W. 344.

[7] Johnson *v.* Heagan, 23 Me. 329; Franklyn Sav. Bank *v.* Reed, 125 Mass. 365; Effinger *v.* Richards, 35 Miss. (6 Geo.) 540.

[8] Jones *v.* Fales, 4 Mass. 245 ("foreign bills"); Fletcher *v.* Blodgett, 16 Vt. 26 (42 Am. Dec. 487) (payable in fulled cloth); Benedict *v.* Cowden, 49 N. Y. 396; 10 Am. Rep. 382 (to be paid from profits of machines when sold).

memorandum has been written on a bill or note before delivery.[1] Where the memorandum is added to the bill or note after its negotiation, with the consent of both parties, it will constitute a part of the instrument, controlling its operation; but if it is added without the consent of all the parties, it will not be a part of the instrument; and if it materially controls or changes the liability of the parties, it will be an alteration which will invalidate the bill or note.[2]

§ 31. **Collateral agreements.**— If an agreement is entered into by the parties to a bill or note, collateral to it, contemporaneously with the execution and negotiation of the instrument, the collateral agreement must be in writing in order to be valid, and control the operation of such bill or note; in obedience to the general rule of evidence, which prohibits the admission of parol evidence to vary or control the provisions of a written instrument.[3] Subsequent agreements, whose terms change those of bills and notes, already delivered, partake of the nature of novations; and if they are based upon a sufficient consideration and are fully executed or performed, they are binding upon all parties who take the note or bill with notice of the collateral agreement, although they may not have been reduced to writing.[4]

§ 32. **Agreements to renew.**— The most frequent collateral agreement in practice is the agreement for renewal of a note or bill. If it is contemporaneous, it must be in

[1] Tuckerman *v.* Hartwell, 3 Me. 147 (14 Am. Dec. 225); Henry *v.* Colman, 5 Vt. 402; Effinger *v.* Richards, 35 Miss. (6 Geo.) 540; Makepeace *v.* Harvard College, 10 Pick. 298. But see Bay *v.* Shrader, 50 Miss. 336, where it is held that the presumption is *contra*, where the memorandum is on the back, instead of on the face of the instrument.

[2] See *post*, chapter on Forgeries and Alterations.

[3] Fleming *v.* Gilbert, 3 Johns. 520; Noell *v.* Gaines, 68 Mo. 649; Bruce *v.* Carter, 72 N. Y. 616; Elliott *v.* Deason, 64 Ga. 63; Polo Mfg. Co. *v.* Parr, 8 Neb. 379 (30 Am. Rep. 830); Dobbins *v.* Parker, 46 Iowa, 357; Muzzy *v.* Knight, 8 Kan. 456.

[4] Dow *v.* Tuttle, 4 Mass. 414 (3 Am. Dec. 226); Allen *v.* Furbish, 4 Gray, 504 (64 Am. Dec. 87); Kelso *v.* Frye, 4 Bibb. 493.

writing; if it is subsequent, it must be supported by an independent consideration.[1] A contract for renewal is exhausted by one renewal; [2] and it has been held that the agreement must state with certainty the time of extension, in order to bind all parties to the note or bill.[3]

ILLUSTRATIVE CASES.

Coapstick *v.* Bosworth, 121 Ind. 6 (22 N. E. 772).
Jacobs *v.* Mitchell, 46 Ohio St. 601 (22 N. E. 768).
Horner *v.* Horner, 145 Pa. St. 258 (23 A. 441).

Oral Agreement Affecting Terms of Note Inadmissible.

Coapstick *v.* Bosworth, 121 Ind. 6 (22 N. E. 772).

BERKSHIRE, J. This was a suit upon a promissory note, which reads as follows: "$400. Sedalia, Ind., March 19th, 1884. One year after date, for value received, I promise to pay Mary A. Bosworth four hundred dollars; this note to be collected by herself during her natural life. If not collected before her decease, it shall be void as to other parties. Washington W. Coapstick." Issue having been joined, the case was submitted to the court for trial, and a finding made for the plaintiff. The appellant then filed a motion for a new trial, which the court overruled, and he saved an exception. The court then rendered judgment upon the finding for the amount due upon the note. Before entering upon the trial the appellant made a motion for a continuance, which was overruled, and an exception properly reserved.

There are but two errors assigned: (1) The court erred in overruling the motion for a continuance. (2) The court erred in overruling the motion for a new trial. Both errors present the same question,— the competency of certain evidence which the appellant offered to introduce. The testimony offered by the appellant was, in substance, as follows: That at the date of the execution of the note the parties were tenants in common of a certain tract of land, the appellant holding title to three-fourths and the appellee to one-fourth thereof; that at the date on which the note was executed, and contemporaneous therewith, it was agreed between the parties that the appellee should convey her one-fourth interest to the appellant, and that in consideration

[1] Lime Rock Bank *v.* Mallett, 34 Me. 547 (56 Am. Dec. 673); Central Bank *v.* Willard, 17 Pick. 150 (28 Am. Dec. 284); Franklin Sav. Bank *v.* Reed, 125 Mass. 365.

[2] Innes *v.* Munro, 1 Exch. 473.

[3] Krouskop *v.* Shoutz, 51 Wis. 204 (8 N. W. 241).

thereof he should pay her thereafter an annuity not to exceed $40, which should be given her in goods, provisions, or money, from time to time, as she might need it during her natural life, but that in no event should such payment exceed $40 per annum; that one Shields, a notary public, was called upon to write out and take said Mary's acknowledgment to the deed for her said interest in the land; that at his suggestion the note sued on was drawn up and signed for the purpose of securing the appellee in the payment of said annuity, and for no other or different purpose; that it was agreed and understood at the time of the execution of the note and deed that no part of said note was ever to be paid except in the manner aforesaid, and that it was not to be paid at all, even as an annuity, after the appellee's death; that no other or different consideration was to be paid to the appellee for her interest in said land.

It is well settled in this State that the true consideration may be shown for a promissory note or other obligation by parol evidence; and if there was no consideration, or if the consideration has failed, parol evidence may be given to establish the fact. This rule of law is so well established that we do not feel called upon to cite authorities. If, therefore, the offered evidence had a tendency to show that the note was executed without consideration in whole or in part, or to establish a failure of consideration as to all or any part of the note, the court erred in its rulings complained of, and a new trial should be granted. But there is another rule which is equally well settled,—that parol evidence will not be received of a previous or contemporaneous verbal understanding between the parties to vary the terms and conditions of a written contract or obligation. Stewart *v.* Babbs, ante, 770 (present term), and authorities cited. But we need not cite authorities in support of this well-established rule. If, therefore, the offered evidence did not go to the consideration, and its only tendency would have been to prove the existence of a contemporaneous verbal agreement inconsistent with the terms and conditions of the note, then the rulings of the court were right, and the judgment should be affirmed.

It is evident that the conveyance was the consideration for the note. It is conceded by the offer that the note was executed to secure to the appellee the amount that was to be paid to her for the land. It is not claimed that the amount which the note represents is not the price that was agreed on for the land, nor that it was not worth the amount which the note calls for. The note and conveyance constituted but one contract, and the contract which the parties finally made, and the same is not impeached by either fraud or mistake. Suppose this suit had not been commenced, but the appellee had been willing to take $40 per year, as the appellant proposed to pay her, and suppose both are permitted to live for 20 years or more from the date at which the note was executed, at the end of 10 years the appellant would

pay $400, the amount of the note. Could the appellee compel the appellant to continue to pay her the $40 per annum? This will hardly be claimed. But if she could, upon what contract would her right rest? Not upon the written contract which the parties entered into, for there are no such conditions contained in it. The action would have to be maintained either upon the verbal agreement, independent of the written contract, or upon the latter, varied and controlled by the verbal agreement; and this would be in violation of the well-established rule to which we have referred, and the existence of which the appellant concedes in his brief. If the appellee cannot take advantage of the contemporaneous verbal agreement, neither can the appellant.

The ruling of the court is so clearly right that we feel that we must affirm the judgment, with damages. Judgment affirmed, with 5 per cent damages, and costs.

Contemporary Agreement as to Time of Payment where Time is Stipulated in the Instrument.

Jacobs *v.* Mitchell, 46 Ohio St. 601 (22 N. E. 768).

Error to circuit court, Allen county.

The suit below was brought by the holders against the maker of a promissory note, the holders averring that they became the owner of it for a valuable consideration before it became due. The note is as follows: $4.00. December 9, 1884. Thirteen months after date I promise to pay to T. J. McElroy, or bearer, four hundred dollars, value received, 6 per cent. interest. J. W. Jacobs." The questions arise upon a demurrer to the answer, which is as follows: *First defense.* The said defendant, for amended answer to plaintiff's petition says that, concurrent with the execution and delivery of the note upon which this action is brought, the payee thereof, one T. J. McElroy, representing himself to be the agent of the "Crawford, Henry & Williams County Bohemian Oats Association," executed and delivered to said defendant a written agreement, said T. J. McElroy representing to said defendant that he, the said McElroy, had full authority to bind said company as its agent. It is expressly stated in said written agreement, executed and delivered by said McElroy to said defendant, that the note given by said defendant to said T. J. McElroy should not be due and payable, and the amount therein named be called for, until said Bohemian Oats Association should sell for said J. W. Jacobs 80 bushels of Bohemian oats at $10 per bushel. This said agreement was taken by said J. W. Jacobs as a part consideration for the amount named in said note, which said Jacobs agreed to pay upon fulfillment of said written agreement. The only other consideration ever received by said Jacobs for said note was 40 bushels of oats, which were not worth more than 40 cents per bushel when received. The terms of said written agreement have never been

complied with, either by said T. J. McElroy or the said oat association The plaintiffs, before their alleged purchase of said note, knew that said written agreement existed, and had full notice of the force and intention thereof, and defendant denies that plaintiffs purchased said note before maturity. *Second defense.* Said defendant says that the said note upon which the action was brought was obtained from said defendant by one T. J. McElroy, payee, by fraud, and was disposed of by said McElroy fraudulently, and that said fraud consisted of this, to wit: The said T. J. McElroy, on or about the 9th day of December, 1884, represented to said defendant that he was the agent of the "Crawford, Henry & Williams County Bohemian Oats Association," and for the purpose of defrauding said defendant, and to obtain his signature to a promissory note, agreed to deliver to said defendant 40 bushels of so-called Bohemian oats, representing falsely that said oats were of an extraordinary quality and value, when in fact the said oats were of no more value than oats ordinarily raised by farmers; and, for the further purpose of defrauding said defendant, said T. J. McElroy represented and agreed, on the part of said company, that if said defendant would take said 40 bushels of oats, and deliver to said McElroy his promissory note for the sum of $400, that he, the said McElroy, would hold said note and not dispose of it until after said Bohemian Oats Company should sell for said Jacobs 80 bushels of oats out of the next year's crop, at $10 per bushel, and that said note would then, and not until then, have to be paid by said Jacobs. Said agreement by said McElroy on the part of said company was in the form of a partly written and partly printed bond, and was delivered by said McElroy to said defendant concurrent with the delivery of said note, who, relying on the said false and fraudulent statements of said McElroy, and believing that they were true, when in fact said false representations were made with intent to defraud said defendant by said McElroy, did sign said note, and deliver the same to said McElroy, who, contrary to his said agreement, and for the purpose of defrauding said defendant, disposed of said note so that defendant might not be able to make any defense thereto. Said agreement by said McElroy to sell, or cause to be sold by said company, said 80 bushels of oats, has not been performed, although the time has long since expired when said oats were to be sold, and said Jacobs retained 80 bushels of said oats, and still retains said oats, for the purpose of performing said contract on his part. The plaintiffs, defendant avers, took said note with knowledge of said contract between said McElroy and said defendant; and defendant further avers that plaintiffs are not *bona fide* holders of said note. Wherefore defendant asks that he may go hence with his costs.

The demurrer was sustained, and judgment rendered for the plaintiffs; and on proceedings in error the judgment was affirmed by the circuit court.

Per Curiam (*after stating the facts as above*). We think the court erred in sustaining the demurrer to the answer of the defendant. The first defense is based upon the non-performance of a contemporaneous written agreement, made and entered into by the parties in regard to the note, and of which it is averred the plaintiffs had notice when they became the holders of it. They then stand in the shoes of the original payee, McElroy. Although the note stipulates that it is payable 13 months after date, still this must be controlled, as between parties and holders with notice, by the written agreement; that it is not to become due and payable until the association has sold for the maker 80 bushels of oats at the price named. 2 Pars. Notes & B. 144, 534. It is not necessary that an answer should be returned to the question why the parties should have subjected the absolute stipulation of the note as to the time of payment to the provisional terms of the written agreement. It is sufficient to say that they have seen fit to do so, and the agreement is binding on the holder. The effect of it is to give the maker the right to pay the note according to its terms, or to decline to do so until the terms of the written agreement are complied with, if, in his judgment, it would be more prudent to do so. This branch of the answer, then, states a sufficient defense to the action,— non-performance of the agreement.

The case of Webb *v.* Spicer, 66 E. C. L. 894, 898, is, when rightly considered, not in conflict with this holding. The point of that decision was that the written agreement was not between the parties to the note. Here, it is. The fact that the suit is not between the original parties to the note and agreement does not affect the question, since the plaintiff acquired his title with notice, and stands in the shoes of the original payee.

The second defense is based upon the alleged fraud of McElroy in obtaining the defendant's signature to the note by fraudulent representations as to the value of the oats. As it is also averred that the plaintiffs took the note with knowledge of the fraud, the facts averred certainly constitute a defense, and the demurrer should have been overruled. Neither of these defenses show that the maker was a party to any contemplated fraud upon the public. If the averments be true, and they are admitted by the demurrer, he was simply deceived into the belief that money could honestly be made out of the introduction of a new variety of oats, and the assumption that he was a party to any contemplated fraud on others at the time he executed the note is inconsistent with the averments of his answer. But if the assumption were true, still the illegal character of the consideration might be pleaded as a defense by the maker to an action on the note by the other party, or any holder of it with notice. Complicity in a wrong may defeat a party who, by action, seeks to enforce an executory contract based upon it, or to obtain affirmative relief against the contract, as by injunction or cancellation; but such complicity does not preclude a defendant from pleading the facts as a

defense, although he may be *in pari delicto*. Roll *v*. Raguet, 4 Ohio, 400; McQuade *v*. Rosecrans, 36 Ohio St. 442; Kahn *v*. Walton, 46 Ohio St. 195, 209; 20 N. E. Rep. 203.

Judgment reversed, and cause remanded to the court of common pleas, with directions to overrule the demurrer, and for further proceedings.

Effect of Contemporary Agreement as to time of Payment, where None is Stipulated in Instrument.

Horner *v*. Horner, 145 Pa. St. 258 (23 A. 441).

McCollum, J. The contest in this case is between the maker and payee of the note in suit. The note is therefore subject to any equitable defense or set-off which the maker has against it. If it was executed and delivered upon and as part of the agreement set out in the affidavits, the terms of the agreement and the damages resulting from a breach of it are matters proper to be considered in this action. As no time is mentioned in the note for its payment, the legal inference is that it is payable on demand; but this inference may be rebutted by proof of a contemporaneous parol agreement fixing the time for the payment of it. Ross *v*. Espy, 66 Pa. St. 481. Such agreement is not in contradiction to the terms of the written instrument; it only prevents the implication raised by the law in the absence of any agreement as to the time of payment. The evidence of it is not, therefore, in violation of the rule which forbids the introduction of oral testimony to destroy, contradict, or vary the terms of a written contract. It is also well settled in Pennsylvania that a written instrument obtained on the faith of a contemporaneous parol agreement cannot be enforced in violation of such agreement. The attempt to so use it subjects the writing to modification or contradiction by parol evidence of what occurred at its execution. It view of these principles, we think the affidavits of the 8th and 20th of May contain a valid answer to the appellee's claim. But it is alleged that they were not presented in time, and that the judgment was properly entered for want of an affidavit of defense. If this is so, the judgment must stand, because we cannot review the action of the court in refusing to take off a judgment so entered. We may think that the court, in the exercise of a sound discretion, might properly have set aside the judgment, and allowed the appellant to present her defense to a jury; but this alone would not justify a reversal for denying her motion to take it off. It must be a palpable abuse of discretion which will warrant our interference in such a matter. We inquire, then, whether it was the duty of the appellant, under the rules of court, to answer the appellee's claim by affidavit, and, if so, whether she was in default at the time the judgment was entered. There are three rules of court which relate to the subject, and these we will con-

sider in the order of their adoption. The first provides that when the defendant appeals from the judgment of a justice of the peace he shall, at the time of filing the transcript, enter and serve a rule on the plaintiff to declare in 30 days from the first day of the term to which the transcript is filed, and that the plaintiff shall give notice to the defendant of the filing of the *narr.*, and to plead in 30 days. The second rule is, in terms, alternative to the first, and provides that the transcript may be treated as the *narr.*, and within 30 days from the filing of it by the defendant he shall plead to it. The third rule makes the pleadings and the procedure on appeals from the judgments of justices of the peace the same as in like cases commenced in the court, but dispenses with the filing of a statement of claim other than the transcript, unless the defendant enters a rule for a more specific statement; and in such case, on the filing of such statement, he "is required to reply thereto by affidavit as in the other cases." In this case, therefore, the appellant might have treated the transcript as a *narr.*, and, if she had done so, she could not have been called on for an affidavit of defense. But she elected to require a more specific statement of claim, and when she received notice of the filing of it she became liable to be proceeded against under the third rule. There is nothing confusing or inconsistent in these rules. They constitute an intelligible system, under which the appellant had an option to treat the transcript as the *narr.* or compel a more specific statement of claim. As she sought and obtained a more specific statement, it became her duty to file a sworn answer to it within 30 days. Because she did not do this, judgment was entered against her under the rules. These rules are not unreasonable, and the power of the court to make them cannot be doubted. We are unable to find any action on the part of the appellee which can be construed into a waiver of her right to require an affidavit of defense. The notice to plead was compulsory by the terms of the rule under which the appellant proceeded for a more specific statement of claim, and cannot operate as a waiver or estoppel. It may be conceded that the right to an affidavit of defense may be waived, but a mere notice to plead, when required by the rule under which the appellant asked for a specific statement, is not a waiver. In O'Neal *v.* Rupp, 22 Pa. St. 395, a rule to plead and a rule to arbitrate were entered nearly four months after the affidavit of defense was filed, and subsequently a judgment was taken for want of a sufficient affidavit, and it was held that "a party who intends to ask for judgment for the reason that the affidavit of defense is deficient must do so before he has taken any steps in the cause, subsequent to the affidavit, calculated to mislead his opponent." But in Duncan *v.* Bell, 28 Pa. St. 516, this court refused to hold that the reference of a cause to arbitrators at the instance of the plaintiff, and an award in his favor from which the defendant appealed, making the usual affidavit for that purpose, was a waiver on the part of the plaintiff of the right to require an affidavit of defense.

The case, as reported, is misleading, because the only point decided was that the affidavit was filed in time. We have noticed these cases specifically, as they are cited by the appellant in support of her claim of waiver. As we cannot agree with the appellant that there was a waiver, or that the rules in question are confusing, inconsistent, or unlawful, we are constrained to affirm the judgment. Judgment affirmed.

CHAPTER IV.

PARTIES TO BILLS AND NOTES.

SECTION 33. Infants.
34. Lunatics.
35. Drunkards and spendthrifts.
36. Married women.
37. The bankrupt or nsolvent payee.
38. Alien enemies.
39. Bill or note executed by agent.
40. Form of signature by agent.
41. Partners.
42. Form of the firm's signature.
43. Private corporations.
44. Form of signature by agents of corporations.
45. Commercial paper of corporations under seal.
46. Drafts or warrants of one officer of the corporation on another.
47. Governments.
48. Municipal or public corporations.
49. Fiduciary parties and personal representatives.

§ 33. **Infants.**— According to the general law of contracts, the contract of the infant is voidable, and subject to his ratification, at his option, on arrival at majority. The only exception to this rule is in relation to his contracts for necessaries, which are absolutely valid; *i. e.*, he is liable for the value of the goods furnished him as necessaries.[1]

In applying this general law to bills and notes, it is found that the bills and notes of infants are always voidable by them, even though they are given for necessaries; for their liability for necessaries is not on the price agreed upon, but on the *quantum meruit*, and money is never held to be a necessary.[2] Where a bill or note is executed jointly by an adult

[1] See Lawson on Contracts and other treatises on Contracts for a full treatment of these questions.

[2] Towle *v.* Dresser, 73 Me. 252; Everson *v.* Carpenter, 17 Wend. 419; Alsop *v.* Todd, 2 Root, 109; Baldwin *v.* Rosier, 1 McCrary, 384; McMinn

and an infant, it will be binding on the adult and voidable by the infant.[1] In all cases, where the infant's note or bill is held to be voidable, and not absolutely void,— and this is the prevailing rule — he may ratify the note or bill on his arrival at majority, and thereafter the paper will be absolutely binding upon him, as if it had never been tainted by his infancy; and his ratification inures to the benefit of all subsequent holders.[2] Where the payee or indorsee of a bill or note is an infant, his indorsement is not binding upon him; so that he may repudiate the same, and recover on the note or bill from the primary obligors and prior indorsers. On the other hand, whoever makes a bill or note payable to an infant or order or bearer, guarantees the capacity of the infant to transfer the paper by indorsement, or delivery, and is liable to the subsequent holder, who receives it for value from the infant and without notice of his infancy. Where the infant is the payee, the maker of the note and acceptor of a bill are liable to the subsequent *bona fide* holder, and they are estopped from setting up the infancy of the payee as a defense to an action by such subsequent holder. On the other hand, if the infant should disaffirm his indorsement or transfer of the note or bill, he may likewise recover of the maker and acceptor respectively.[3]

§ 34. **Lunatics.**— Lunacy in a party to a contract makes the contract generally voidable. There is, however, a dis-

v. Richmond, 6 Yerg. 9; Des Moines Ins. Co. *v.* McIntire (Iowa, '97), 68 N. W. 565; Ray *v.* Tubbs, 50 Vt. 688 (27 Am. Rep. 519); Buzzell *v.* Bennett, 2 Cal. 101; La Grange Inst. *v.* Anderson, 63 Ind. 367 (30 Am. Rep. 472); see Ayers *v.* Burns, 87 Ind. 245. The acceptance of a bill by an infant is equally voidable. Willamson *v.* Watts, 1 Campb. 552.

[1] Taylor *v.* Dansby, 42 Mich. 82; Crabtree *v.* May, 1 B. Mon. 289; Slocum *v.* Hooker, 12 Barb. 563.

[2] Lawson *v.* Lovejoy, 8 Me. 405 (23 Am. Dec. 526); Edgerly *v.* Shaw, 25 N. H. 514 (57 Am. Dec. 349); Ring *v.* Jamison, 66 Mo. 424.

[3] Nightingale *v.* Withington, 15 Mass. 272 (8 Am. Dec. 101); Goodsell *v.* Myers, 3 Wend. 479; Briggs *v.* McCabe, 27 Ind. 327 (89 Am. Dec. 503); Hardy *v.* Waters, 38 Me. 450; Hastings *v.* Dollarhide, 24 Cal. 195.

position of some of the courts to hold that the contract is binding on the lunatic, where the other party is ignorant of his weakness of mind, has paid full value and has not taken advantage of his mental weakness.[1] The better opinion, however, limits the liability of the lunatic on his contract to cases, where the contract or note has been fully performed by the other party, in ignorance of his insanity. Where the contract is still executory, it is held to be absolutely void.[2] It is also held that, where a lunatic has been declared to be insane, and he and his property have been placed by order of the court in the care of a committee or guardion, his note or other contract is absolutely void.[3]

Where the lunatic is the payee of a negotiable note or bill, the same rule generally obtains as in the case of an infant payee, *i. e.*, that he may avoid the indorsement or transfer of the paper, and that the indorsee can recover of the maker or acceptor, if he takes it as a *bona fide* holder, for full value and without notice of the insanity of the payee.[4] Where insanity occurs after the execution of the note, although the indorsement may be voidable, the maker or acceptor is not liable on any guaranty of capacity.[5]

§ 35. **Drunkards and spendthrifts.** — Drunkenness, when it is great enough to make one temporarily bereft of

[1] Moore *v.* Hershey, 90 Pa. St. 196; Lancaster Co. Bk. *v.* Moore, 78 Pa. St. 407 (21 Am. Rep. 24); Mutual Life Ins. Co. *v.* Hunt, 79 N. Y. 541; Matthieson *v.* McMahan, 37 N. J. Eq. (9 Vroom) 548; Riggan *v.* Green, 80 N. C. 236 (30 Am. Rep. 77).

[2] Sentance *v.* Poole, 3 C. & P. 1; Matthieson *v.* McMahan, 37 N. J. Eq. (9 Vroom) 548; Scanlan *v.* Cobb, 85 Ill. 296. See also Seaver *v.* Phelps, 11 Pick. 304 (22 Am. Dec. 372); Rogers *v.* Blackwell, 49 Mich. 192; Van Patton *v.* Beals, 46 Iowa, 63; Wilder *v.* Weakley, 34 Ind. 181.

[3] Hovey *v.* Hobson, 53 Me. 45 (89 Am. Dec. 705); Nichols *v.* Thomas, 53 Ind. 42; Wadsworth *v.* Sharpsteen, 8 N. Y. 388; Jackson *v.* Gumaer, 2 Cow. 555.

[4] Smith *v.* Marsack, 6 C. B. 486; Nat. Pemberton Bk. *v.* Porter, 125 Mass. 333 (28 Am. Rep. 235). But see Peaslee *v.* Robbins, 3 Met. 164; Burke *v.* Allen, 29 N. H. 106 (61 Am. Dec. 642).

[5] Alcock *v.* Alcock, 3 Man. & G. 268. See Moore *v.* Hershey, 90 Pa. St. 196; Van Patton *v.* Beals, 46 Iowa, 62.

his reason, will be a cause for invalidating the note or other contract made by him in such a condition. But it is held that the defense of drunkenness cannot be set up against a *bona fide* holder.[1] A drunkard's note or contract may be ratified after his recovery from his drunken stupor.[2] He may also disaffirm such note or contract, except against a *bona fide* holder of negotiable paper; but in order to disaffirm, he must restore the consideration.[3]

Where one has been placed under guardianship by order of a court, on the ground of being a spendthrift, he is deprived of the power to make or indorse a negotiable instrument.[4]

§ 36. **Married women.**— At common law, the legal personality of the woman was completely merged in that of the husband; and with the loss of her legal personality, she was also deprived of the control of her property, and of her contractual powers. The contract of the married woman was absolutely void. Of late years, in this country, a tendency has been manifested to break away from these common law disabilities of coverture; and since the legislative powers of the different States are acting independently of each other, we naturally find the existing law, in relation to the property rights and contractual powers of married women, to vary in detail with each State, in almost all of which is found a more or less decided variation from the common law. For these reasons, only a general statement of the essential principles of the common law can be given here, leaving the student to ascertain the actual law

[1] State Bank *v.* McCoy, 69 Pa. St. 204 (8 Am. Rep. 246); McSparran *v.* Neely, 91 Pa. St. 17; Northam *v.* Latouche, 4 C. & P. 145; Hale *v.* Brown, 11 Ala. 87; Smith *v.* Williamson, 8 Utah, 219 (30 P. 753).

[2] Joest *v.* Williams, 42 Ind. 565; Calkins *v.* Fry, 35 Conn. 170; Matthews *v.* Baxter, L. R. 8 Exch. 132. But see *contra*, Berkley *v.* Canon, 4 Rich. 136.

[3] Joest *v.* Williams, 42 Ind. 565; McGuire *v.* Calahan, 19 Ind. 128.

[4] Manson *v.* Felton, 13 Pick. 206; Lynch *v.* Dodge, 130 Mass. 458. As to the power of the State to place a spendthrift under guardianship, see Tiedeman's Limitations of Police Power, § 138.

prevailing in his State, by a study of the local statutes and adjudications.

The bill or note of a married woman was, according to the common law, absolutely void, even as against a *bona fide* holder, whether she appeared as a maker, drawer, acceptor or indorser.[1] And so completely void was the married woman's note or bill, that her ratification after her husband's death was not binding upon her, unless it was supported by a fresh consideration.[2] Where a woman became a party to a bill or note before marriage, her husband was at common law held liable, where suit was brought on such note or bill during the coverture. But his liability did not survive the wife. In such a case, the suit had to be brought against the wife's personal representatives.[3] Where she was the payee of a note or bill, her husband had the power to receive and enforce payment; but if he did not reduce it to possession, *i. e.*, collect it during the coverture, he lost all control over the note or bill. If the wife survived the husband, it became her absolute property again; and if she died during coverture, her personal representatives, and not the husband, were entitled to receive payment.[4] She could not make good title by her sole indorsement. Her indorsee got no title when indorsed during coverture, unless her husband joined in the indorsement, or gave his consent to the transfer in some other manner.[5]

[1] Mason *v.* Morgan, 2 Ad. & El. 30; Kenworthy *v.* Sawyer, 125 Mass. 28; Bloomingdale *v.* Lisburger, 24 Hun, 355; Kenton Ins. Co. *v.* McClellan, 43 Mich. 564; Higgins *v.* Willis, 35 Ind. 371; Robertson *v.* Bruner, 24 Miss. (2 Cushm.) 242; Comings *v.* Leedy, 114 Mo. 454 (21 S. W. 804).

[2] Littlefield *v.* Shee, 2 B. & Ad. 811; Porterfield *v.* Butler, 47 Miss. 165 (12 Am. Rep. 329); Watkins *v.* Halstead, 2 Sandf. 311; Vance *v.* Wells, 6 Ala. 737.

[3] Mitchinson *v.* Hewson, 7 T. R. 348; Cureton *v.* Moore, 2 Jones Eq. 204; Morrow *v.* Whitesides, 10 B. Mon. 411.

[4] Legg *v.* Legg, 8 Mass. 99; Dean *v.* Richmond, 5 Pick. 461; Story *v.* Baird, 2 Green (N. J.), 262; Allen *v.* Wilkins, 3 Allen, 321; Haywood *v.* Haywood, 20 Pick. 517; Driggs *v.* Abbott, 27 Vt. 580 (65 Am. Dec. 214).

[5] Savage *v.* King, 17 Me. 301; Shuttlesworth *v.* Noyes, 8 Mass. 229; Stevens *v.* Beals, 10 Cush. 291 (57 Am. Dec. 108); Menkens *v.* Heringhi, 17 Mo. 297; Hemmingway *v.* Matthews, 10 Tex. 207; Hamilton *v.* Brooks,

An exception arose, at an early day, to the common law disability of married women, where she had an equitable separate estate. Under the rules of equity, where an equitable estate was granted to a married woman, for her *sole and separate use*, the English and most of the American courts held that, in respect to such separate estate, she was possessed of all the powers of a single woman.[1] As a result of this repudiation of the common law disability of coverture, it became at an early day a commonly accepted doctrine that the contracts of a married woman, including notes and bills, which were made by her in reliance upon her separate property, and specially for the benefit of such separate estate, were valid obligations as liens upon her separate estate; although they were not binding upon her individually, and independently of the separate estate. In order to make such a contract binding as a lien on her separate estate, the intention to charge her separate estate must be proven. Where the contract was made for the benefit of the estate, the intention to charge was implied; in all other cases, it had to be proven affirmatively. In many States, where she has a separate estate, every contract is presumed to have been intended as a charge upon her separate estate; while in others, that intention must be shown by affirmative proof. Where the law is so variable, a citation of a few cases would be of no service, and there is no room for a full citation of authorities. Hence the reader is referred to the adjudications of his own State.

§ 37. **The bankrupt or insolvent payee.**— When an insolvent person goes into bankruptcy, all his property passes to his assignee, and, of course, his bills and notes receivable are thereafter only collectible by his assignee. He cannot thereafter make a valid transfer of such a bill or

51 Tex. 142; Miller *v.* Delamater, 12 Wend. 433 (indorsement by wife in her maiden name, with husband's consent); Mudge *v.* Bullock, 83 Ill. 22; McClain *v.* Weidemeyer, 25 Mo. 364.

[1] See Tiedeman Real Prop., § 469.

note, unless he has, prior to his bankruptcy, made a valid contract for its transfer, when he can complete it subsequently by indorsement or delivery.[1] If, however, one should make a bill or note payable to a bankrupt, he cannot deny the payee's capacity to make a legal indorsement, and the indorsee can bring suit on the paper.[2]

§ 38. **Alien enemies.**— The fact, that one of the parties to a note or bill is an alien, does not affect its validity. But if he is an alien enemy, by the common international law of the civilized world, the paper is declared to be absolutely void. All bills of exchange and promissory notes, negotiated between persons, whose countries are then at war with each other, are void, it matters not in what character the alien enemy appears as a party to the instrument; whether as maker or payee of a note, or as drawer, drawee and acceptor, or payee of a bill. This principle was applied in numerous cases to bills and notes which were negotiated between citizens of the United States and of the Confederate States, during the great American Civil War.[3] The only exception to this rule, which appears to be generally recognized, is where a bill is drawn by a citizen of one country on an alien enemy in favor of another alien enemy.[4]

§ 39. **Bill or note executed by agent.**— The power of one to appoint an agent and invest him with the authority to act for him and in his name, is one that is conceded by the law of the civilized world to be applicable in all the contractual relations of life, with the exception of two, the

[1] Hersey *v.* Elliott, 67 Me. 526 (24 Am. Rep. 50); Hughes *v.* Nelson, 28 N. J. Eq. (2 Stew.) 547; First Nat. Bank *v.* Gish, 72 Pa. St. 13; Jerome *v.* McCarter, 94 U. S. 734.

[2] Dayton *v.* Dale, 2 B. & C. 293.

[3] Hanger *v.* Abbott, 6 Wall. 540; Phillips *v.* Hatch, 1 Dill. 571; Woods *v.* Wilder, 43 N. Y. 164 (3 Am Rep. 684); Tarleton *v.* Southern Bank, 49 Ala. 229; Lacy *v.* Sugarman, 12 Heisk. 354; McVeigh *v.* Bank of the Old Dominion, 26 Gratt. 785; Williams *v.* Mobile Sav. Bank, 2 Woods, 501.

[4] Haggard *v.* Conkwright, 7 Bush, 16 (3 Am. Rep. 297).

solemnization of marriage[1] and the execution of wills. It is certainly an universal rule that bills, notes and checks, as well as other kinds of Commercial Paper, may be executed by agents; and when so exercised by authority of the principal, express or implied, and in his name, the principal will be bound by the bill, note or check, as if he had executed it himself. The general law of agency will naturally not be presented here in full, and it will be treated only so far as it is necessary to an understanding of the validity of bills and notes, when they are executed by agents.

In order that one may act as an agent for another, it is necessary that he shall have sufficient understanding to comprehend the nature of his duties. For that reason, insane people, and infants not having arrived at the age of discretion, cannot act as agents. But the disabilities of infancy, coverture, and the like, which would incapacitate one from making a valid contract for oneself, would not disqualify him or her from acting as the agent of another, if the actual mental capacity was sufficient to enable a reasonably intelligent exercise of the power.[2] And the wife, although absolutely incapacitated at the common law to make a contract in her own name, is able, when duly authorized, to make a valid bill or note as the agent of her husband.[3]

But in every case, where one undertakes, as agent of another, to make a note, draw or accept a bill, or to indorse either; in order that the act of the agent may be binding upon the principal, the authority to act in that capacity as an agent must be proven, either by express grant of the power, or by implication of the law from the creation of a general agency, or the express grant of some other power, the exercise of which requires the exercise of the power to sign the principal's name to negotiable instruments.

[1] I believe, however, that in some countries marriage may be solemnized by proxy.

[2] Tiedeman Com. Paper, § 73.

[3] Tiedeman Com. Paper, § 74.

Where the power to execute or indorse a bill or note, or to accept a bill, is expressly given, it need not be in writing, unless the local statute requires the power of attorney to be reduced to writing; and it is believed that the statutes do not generally require a written authority. The authority may be given by parol.[1] The more common cases for litigation are those, in which the power to issue or indorse negotiable paper is held to be implied from the express grant of some other power. But an express authority to sign the name of the principal to a contract is strictly construed, and will not be enlarged by implication, unless the alleged implied authority is plainly necessary to the full performance of the express duty or authority. This is a general rule of the law of agency; but it is more strictly enforced in the case of bills and notes and other negotiable instruments.

Generally, the power to issue bills and notes, or to make the principal a party to them in any character whatever, will not be implied from the authority of the agent to transact business in the name of principal, in the performance of which duty, the bill or note would be convenient, but not absolutely necessary. Thus, a power to buy goods does not imply the power to give a note in payment of the price.[2] And even where the agent is acting under a general power of attorney, to transact all business of every kind, it seems to be generally held that the power to make the principal a party to a bill or note (except, probably, as an indorser for collection) is not implied.[3] The power to execute bills and notes must be expressly given.

[1] Tiedeman Com. Paper, § 75; Forsyth *v.* Day, 46 Me. 176; Humphreys *v.* Wilson, 43 Miss. 328; Handyside *v.* Cameron, 21 Ill. 588 (74 Am. Dec. 119.

[2] Taber *v.* Cannon, 8 Met. 456; Temple *v.* Pomroy, 4 Gray, 128; Bank of Hamburg *v.* Johnson, 3 Rich. 42; State of Wisconsin *v.* Torinus, 24 Minn. 332; Hogarth *v.* Wherley, L. R. 10 C. P. 530. But see Nutting *v.* Sloan, 59 Ga. 392, where a draft on a principal by an agent for goods bought was held to be within the implied power of the agent.

[3] Thompson *v.* Bank of British N. Am., 82 N. Y. 1; Robinson *v.* Chemical Nat. Bank, 86 N. Y. 407 (indorsement of check); Washburn *v.*

And so, also, where the principal gives the agent an express authority to sign his name to negotiable instruments, the authority is very strictly construed and will not generally be enlarged by implication. Thus, a power to make notes will not be construed to include the power to make bills, or *vice versa*. Nor will a power to accept a bill be implied from a power to draw one; nor the power, to indorse a bill or note, be implied from a power to accept one in payment. From the express grant of any one of these powers, the others are never implied.[1] So, also, where an authority is given to sign a note payable at a particular bank, it does not include an authority to make a note payable elsewhere.[2] In fact, all the limitations, which are imposed by the principal in the grant of a special authority, must be observed; and a note or bill, executed in violation of those limitations in any material matter, will not bind the principal.[3]

But where the general authority is given to an agent to issue bills and notes and indorse the same, in the transaction of the business of the principal, the principal will be bound by all obligations of that kind assumed by the agent, even though they are made in violation of express private instructions.[4]

It may be stated, probably without any qualification whatever, that in no case will the agent be held to have the implied power to bind the principal by the execution or

Alden, 5 Cal. 463; Thompson *v.* Elliott, 73 Ill. 221; Ryhiner *v.* Feickert, 92 Ill. 305 (34 Am. Rep. 130).

[1] School Dist. *v.* Sipley, 54 Ill. 284; First Nat. Bank *v.* Gay, 63 Mo. 33 (21 Am. Rep. 430); Nash *v.* Mitchell, 71 N. Y. 199 (27 Am. Rep. 38).

[2] Craighead *v.* Peterson, 72 N. Y. 279 (28 Am. Rep. 150).

[3] Batley *v.* Carswell, 2 Johns. 48; Nixon *v.* Palmer, 8 N. Y. 398 (note authorized for a particular purpose); Adams *v.* Flanagan, 36 Vt. 412; Bank of Deer Lodge *v.* Hope Min. Co., 3 Mont. 146 (35 Am. Rep. 458). See Tate *v.* Evans, 7 Mo. 419; Bank of State of S. C. *v.* Herbert, 4 McCord, 89, in which the variations from the express directions of the principal were immaterial, and hence the principal was held bound.

[4] Mann *v.* King, 6 Munf. 428; Sykes *v.* Giles, 5 M. & W. 645; Withington *v.* Herring, 5 Bing. 442; Commercial Bank of Lake Erie *v.* Norton, 1 Hill, 501.

indorsement of accommodation paper to any one, who takes the paper with knowledge of its real character.[1]

The power of an agent, to bind his principal by the execution or indorsement of negotiable instruments, may also be implied from his appointment to an office or official position, where one of the implied powers of the incumbent is to act in that capacity for the person or corporation who is his principal. The cashier of a bank or banking house is a notable instance of an officer having such an implied power.[2]

The unauthorized execution or indorsement of a note or bill by an agent may be subsequently ratified, either expressly, or by implication from the principal's acceptance of the proceeds of the transaction, with knowledge of the unauthorized act.[3] And where the principal has repeatedly ratified the unauthorized issue of bills and notes by the agent, one who relies upon the implication, from these acknowledgments of the prior unauthorized acts of the agent, that the agent had the power to sign bills and notes for the principal, may hold such principal liable on the principal of estoppel.[4] The agent guarantees to the party dealing with him his power to act for and to bind his

[1] Stainer *v.* Tyson, 3 Hill, 279; North River Bank *v.* Aymer, 3 Hill, 262; German Nat. Bank *v.* Studley, 1 Mo. App. 260; West St. Louis Bank *v.* Shawnee Bank, 95 U. S. 557.

[2] Minor *v.* Mechanics' Bank of Alexander, 1 Pet. 46; Baldwin *v.* Bank of Newbury, 1 How. 234; Ballston Spa. Bank *v.* Marine Bank, 16 Wis. 120; Barnes *v.* Ontario Bank, 19 N. Y. 156; Cook *v.* State Nat. Bank, 52 N. Y. 98 (11 Am. Rep. 667); Corser *v.* Paul, 41 N. H. 24 (77 Am. Dec. 753); State Bank *v.* Kain, 1 Ill. 75.

[3] Supervisors *v.* Schenck, 5 Wall. 784; Croswell *v.* Lanahan, 101 U. S. 347; Eadie *v.* Ashbaugh, 44 Iowa, 519; Bell *v.* Wandby, 4 Wash. St. 743 (31 P. 18); Turner *v.* Wilcox, 54 Ga. 593; First Nat. Bank *v.* Ballou, 49 N. Y. 155; Roberts *v.* Morrison, 75 Iowa, 321 (39 N. W. 519); First Nat. Bank *v.* Gay, 63 Mo. 33 (21 Am. Rep. 430); Episcopal Charitable Soc. *v.* Dedham Episcopal Church, 1 Pick. 372. See Henry *v.* Heeb, 114 Ind. 275 (16 N. E. 606), for a distinction between ratification of a forgery and of an unauthorized signature.

[4] Prescott *v.* Flinn, 2 Moore & S. 22; Stroh *v.* Hinchman, 37 Mich. 490; Hammond *v.* Varian, 54 N. Y. 398; Abell *v.* Seymour, 6 Hun, 656; Greenfield Bank *v.* Crafts, 2 Allen, 269.

principal; and so, where he signs his principal's name without authority to a bill or note, he is liable to the person dealing with him for damages suffered by the latter, even though he acted innocently and under the *bona fide* but wrong impression, that he had sufficient authority.[1]

§ 40. **Form of signature by agent.** — When the agent signs a note or bill for his principal, he should write the name of his principal and then add his own as agent, viz.: A. (principal) by B. (agent). This is universally considered as the only true correct form of signature. But it is not absolutely necessary to the validity of the instrument as the obligation of the principal, that the signature should be in this exact form. Although it was held at one time to be ambiguous and doubtful, it is now very generally held that the liability of the principal will attach to a paper which is signed by the agent "for" the principal, *i. e.*: B. (agent) for A. (principal). Both names are upon the paper, and the intention of the agent to act only for and in the name of his principal would seem to be made clear enough by such a signature.[2] Although it is advisable for the agent to affix his name to the signature, it is not at all necessary to the validity of the instrument as the obligation of his principal, if he has the authority of the principal to sign the latter's name.[3] But when the agent signs

[1] Ballou *v.* Talbot, 16 Mass. 461 (8 Am. Dec. 146); Bartlett *v.* Tucker, 104 Mass. 336 (6 Am. Rep. 240); Taylor *v.* Shelton, 30 Conn. 122; Feeter *v.* Heath, 11 Wend. 479; White *v.* Madison, 26 N. Y. 116; Dodd *v.* Bishop, 30 La. Ann. 1178; Hall *v.* Crandall, 29 Cal. 567 (89 Am. Dec. 64); Bryson *v.* Lucas, 84 N. C. 680 (37 Am. Rep. 634). But if the third party dealing with him knew of the agent's want of authority, he cannot recover of the agent, particularly where the latter had acted in good faith. Whitney *v.* Wyman, 101 U. S. 392; Jefts *v.* York, 10 Cush. 392. See Hall *v.* Lauderdale, 46 N. Y. 75.

[2] Bank of Genessee *v.* Patchin Bank, 9 N. Y. 315; Mussey *v.* Scott, 7 Cush. 215 (54 Am. Dec. 719); Raney *v.* Winter, 37 Ala. 277; Eckhart *v.* Reidel, 16 Tex. 62; Kimball *v.* Bittner, 62 Pa. St. 203; Houghton *v.* First Nat. Bk., 26 Wis. 663 (7 Am. Rep. 107).

[3] Brigham *v.* Peters, 1 Gray, 139; Mechanics' Bank *v.* Bank of Columbia, 5 Wheat. 326; Odd Fellows *v.* First Nat. Bank, 42 Mich. 461; First Nat. Bank *v.* Gay, 63 Mo. 33 (21 Am. Rep. 430).

his own name without adding the name of the principal for whom he is acting as agent, he is bound, on the paper, individually, although he affixes to his signature the word "agent." Such a suffix is deemed to be a mere *descriptio personæ*, and does not constitute any notice of the agency to the holder or indorsee.[1] And the same rule holds, where a note or bill is made payable to one, who is described as agent, but the principal's name is not given. The agent is individually liable on his indorsement.[2]

While it is a general rule of the law of contracts, as well as of the law of Bills and Notes, that an agent is bound personally on a written contract, which he signs himself, adding to his own signature the word "agent," without disclosing the name of the principal,[3] a disposition on the part of the courts has been manifested in the case of commercial paper to so far relax the rule, as to hold that when a bill is made payable to one as agent, he may indorse it as agent, without personal liability as an indorser; and he may show by parol evidence who is the principal, although his name does not appear in the main body of the note or bill or in the indorsement.[4]

In all such cases of undisclosed principals, the holder has his election, whether to hold liable the agent or the principal when he is discovered. If he elects to hold the principal, the agent is discharged of all liability. And where the holder of a bill or note, signed by "A. agent,"

[1] Williams *v.* Robbins, 16 Gray, 77 (77 Am. Dec. 396); Bartlett *v.* Hawley, 120 Mass. 92; Hall *v.* Bradbury, 40 Conn. 32; Collins *v.* Buckeye State Ins. Co., 17 Ohio St. 215; Toledo Agri. Works *v.* Heisser, 51 Mo. 128; Bryson *v.* Lucas, 84 N. C. 280 (37 Am. Rep. 634); Thurston *v.* Mauro, 1 Gr. (Iowa) 231; Trustees of Cahokia *v.* Rautenberg, 88 Ill. 219.

[2] Bishop *v.* Rowe, 71 Me. 263; Brown *v.* Ames, 61 N. W. 448; 59 Minn. 476; Toledo Agr. Works *v.* Heisser, 51 Mo. 128. See *contra*, that indorsement as agent indicates intention to indorse without recourse, Mott *v.* Hicks, 1 Cow. 533.

[3] Bass *v.* O'Brien, 12 Gray, 477; Pease *v.* Pease, 35 Conn. 131 (95 Am. Dec. 225); Dykers *v.* Townsend, 25 N. Y. 57; Kenyon *v.* Williams, 19 Ind. 45; Junge *v.* Bowman, 72 Iowa, 648 (34 N. W. 612).

[4] Green *v.* Skell, 2 Hun, 485; Moore *v.* McClure, 8 Hun, 558; May *v.* Hewitt, 33 Ala. 161; Hypes *v.* Griffin, 89 Ill. 134 (31 Am. Rep. 71).

knows when he takes the paper, for whom A. is acting as the principal, he is held to have elected to hold the agent, and he cannot thereafter hold the principal. But if he discovers afterwards who the principal is, he has his right of election between the two.[1] Where a paper is payable to an agent, the principal, by proving his title to the paper, can recover of the parties liable on the same. But a *bona fide* holder, by indorsement from the agent, cannot be affected by such a claim of ownership of the undisclosed principal.[2]

§ 41. **Partners as parties.**— When two or more persons form a partnership for the transaction of a business or prosecution of a common venture,— unless one or more of them, by agreement of the parties, assume to the firm the character and limitations of dormant or silent partners,— all of them are impliedly made agents of the firm; and any one of the active partners may bind the firm by the contracts which he makes with others in the name, or for the benefit, of the firm. But the implied authority of the partner, to bind the firm by his contracts, is limited to those which relate to the business of the firm, and which are reasonably necessary to the prosecution of the firm's business. If the contract, although made in the name of the firm, is made for the benefit of the partner individually, or if relates to a business wholly foreign to the partnership venture, the firm is not bound by such contract; unless the partners have given their express sanction, or they have subsequently ratified the unauthorized contract of the partner, either expressly or by implication from the receipt of the consideration of the contract, with knowledge of all the material facts of the case. This may be accepted as a safe terse statement of the law of agency as it is applied to the acts of one partner in the name of the partnership.[3]

[1] French *v.* Price, 24 Pick. 13; Silver *v.* Jordan, 136 Mass. 319; Briggs *v.* Partridge, 64 N. Y. 357 (21 Am. Rep. 617); Jessup *v.* Steurer, 75 N. Y. 613.

[2] Nave *v.* Hadley, 74 Ind. 155; Downer *v.* Read, 17 Minn. 493.

[3] For a fuller discussion of the subject see Tiedeman Com. Paper, Chapter VI., and treatises on Partnerships.

When we apply these general rules to the consideration of the power of one partner to bind the firm by the issue and negotiation of negotiable instruments, by signing the firm's name to such paper, either as maker of a note, or drawer or acceptor of a bill or check, as an indorser of either of these instruments; the first query to arise in the determination of the liability of the firm on such bill, note or check, is whether the act of the partner, in signing the firm's name, was expressly authorized or subsequently ratified by the other partners. If there is an express authorization or a subsequent ratification, there can be no question as to the liability of the partnership on the paper. But where there is no such express or implied ratification, in order that the partnership may be held bound on the paper, it must be shown that the execution of the bill, note or check, by the partner in the firm's name, came within the implied authority of the partner to bind the firm, because the negotiation of the bill, note or check was reasonably necessary in the ordinary prosecution of the business of the firm. If the nature of the business was such that the employment of negotiable paper was necessary, or universally or generally customary in the ordinary prosecution of such business, the partner will have the implied authority to bind the partnership by his use of such paper in the interest of the firm. The nature of the partnership business must determine the existence or non-existence of this implied authority of the partners. And it may be stated as a general proposition, with probably no exception, that where the business of the co-partnership generally requires the use of capital, and procurement of loans, and it is customary for those engaged in that business to borrow money and to receive and issue bills, notes and checks in the ordinary prosecution of the business, the active partner will be held to have the implied power to bind the firm by signing the firm's name to such paper. Thus the members of all trading partnerships have this implied power,[1]

[1] Kimbro *v.* Bullitt, 22 How. 256; Hayward *v.* French, 12 Gray, 453;

and all manufacturing partnerships, where credit is necessary.[1] But where the ordinary prosecution of the business of the partnership does not require the use of commercial paper, the partner has no implied power to bind the firm by his execution of a bill or note. For credit is not essential in such cases to the prosecution of the business.[2] This has been the invariable rule in respect to a firm of practicing lawyers,[3] and of a firm of practicing physicians.[4] This implied power has been denied, although not with such strong reason therefor, to a firm of tavern keepers,[5] brokers,[6] and farmers.[7] But even where the partner has the implied power to bind the partnership by signing the firm's name to a bill, note or check, the power is limited to its exercise in the prosecution of the business of the firm. The partner has not the implied power to bind the other partners, where he signs the firm's name to a negotiable instrument for the accommodation of a third party, unless that is a part of the business of the partnership, which is not usual or common. And so, likewise, is the partner not impliedly authorized to sign the firm's name to notes and bills issued for his own private accommodation or in payment of his own debts. Where the payee or holder of such a paper takes it with

Sedgwick *v.* Lewis, 70 Pa. St. 217; Sherwood *v.* Snow, 46 Iowa, 481 (26 Am. Rep. 155); Atlantic St. Bk. *v.* Savery, 82 N. Y. 291.

[1] Kimbro *v.* Bullitt, 22 How. 256.

[2] See generally Hunt *v.* Chapin, 6 Lans. 139; Ricketts *v.* Bennetts, 4 C. B. 699; Zuel *v.* Bowen, 78 Ill. 234; McCrary *v.* Slaughter, 58 Ala. 230; Huguley *v.* Morris, 65 Ga. 666.

[3] Hedley *v.* Bainbridge, 3 Q. B. 316; Marsh *v.* Gold, 2 Pick. 285; Friend *v.* Duryee, 17 Fla. 111 (35 Am. Rep. 89); Breckenridge *v.* Shrieve, 4 Dana, 375; Smith *v.* Sloan, 37 Wis. 285 (19 Am. Rep. 757).

[4] Except that to the members of such a firm may be conceded the implied power to bind the firm by contract for the purchase of medical supplies, particularly in the case of country doctors, who maintain a stock of drugs and fill all their own prescriptions. Crosthwaite *v.* Rose, 1 Humph. 23 (34 Am. Dec. 613).

[5] Cocke *v.* Branch Bank, 3 Ala. 175.

[6] Yates *v.* Dalton, 28 L. J. Exch. 69; Third Nat. Bank *v.* Snyder, 10 Mo. App. 211.

[7] Prince *v.* Crawford, 50 Miss. 344; Hunt *v.* Chapin, 6 Lans. 139.

knowledge of the unauthorized use of the firm's name, in execution of the paper, he cannot hold the firm liable on it. But, in consequence of the negotiable character of the paper, if he does not know that the implied power has been exercised in the issue of the paper for an unauthorized purpose, outside of the business, he has a right to presume that it was issued by the partner in the due course of the partnership business, and the firm will be bound on it to the *bona fide* holder.[1]

Where the note or bill is issued for the accommodation of another party, it may be so executed as that a subsequent holder may take it without learning from the face of it, that the firm's name has been signed, in order to lend the firm's credit to the paper, and to enable the principal debtor to discount the paper on more favorable terms. And where that is the case, the holder may claim to be a *bona fide* holder and as such to hold the firm liable. That would be true, where the signature of the firm is so used on the paper as to make the partnership appear as a regular party to the bill or note, as maker, drawer or acceptor or as payee or indorsee. But where the signature of the firm is so used so as to make it an irregular indorsement,[2] it is manifest that the paper has not been indorsed by the firm in the due course of its business, and hence the holder cannot claim to be a *bona fide* holder.[3]

§ 42. **Form of the firm's signature.**— The proper form of signature for a firm in any contract is the writing of the

[1] First Nat. Bank *v.* Morgan, 6 Hun, 340; 73 N. Y. 593; Atlantic State Bank *v.* Savery, 82 N. Y. 296; Michigan Bank *v.* Eldred, 9 Wall. 544; Hayward *v.* French, 12 Gray, 453; Graves *v.* Kellenbergen, 51 Ind. 66; Moorehead *v.* Gilmore, 77 Pa. St. 118 (18 Am. Rep. 435); Faler *v.* Jordan, 44 Miss. 283; Sherwood *v.* Snow, 46 Iowa, 481 (26 Am. Rep. 155); Carrier *v.* Cameron, 31 Mich. 373.

[2] See *post*, §   , for a full discussion of irregular indorsements.

[3] National Bank of Commerce *v.* Law, 127 Mass. 72; Stimson *v.* Whitney, 130 Mass. 591; Roth *v.* Colvin, 32 Vt. 125; Marsh *v.* Thompson Nat. Bank, 2 Bradw. 217; Chemung Canal Bank *v.* Bradner, 44 N. Y. 680; Stockdale *v.* Keyes, 79 Pa. St. 251; Carrier *v.* Cameron, 31 Mich. 373; Atlantic State Bank *v.* Savery, 82 N. Y. 294.

firm's name, whatever it is. There is no legal limitation of the partnership's power to adopt any signature which the partners may see fit. It is not an uncommon practice for a firm to do business and to make contracts in the name of one of the partners. And where that fact is established, a note or bill containing the name of that partner may be treated as a partnership obligation. But inasmuch as that partner uses his name in his private transactions, where a note or bill contains the name of the partner, it is presumed to be his private obligation, until it is shown to be a partnership contract; and this must be proven affirmatively, in order to hold the partnership liable.[1]

The firm would also be bound on a note or bill, where a partner, instead of signing the firm's name, writes the individual names of all the partners.[2] Where the firm is the drawee of a bill of exchange, inasmuch as no one but the firm can make a good acceptance, any signature affixed to the acceptance by a partner, where the authority to bind the firm as an acceptance is undoubted, will be sufficient; the writing of the partner's own name would be a good acceptance in the absence of any local statute, requiring the firm's name to be signed to the acceptance.[3] Where a note is made payable to a firm when it was intended for an individual partner, the maker cannot resist

[1] Manufacturer's &c. Bank *v.* Winship, 5 Pick. 11 (16 Am. Dec. 369); Crocker *v.* Colwell, 46 N. Y. 212; Boyle *v.* Skinner, 19 Mo. 82; Buckner *v.* Lee, 8 Ga. 285; Scott & Thacher *v.* Colmesnil, 7 J. J. Marsh. 416; Bank of Rochester *v.* Monteath, 1 Denio, 402 (43 Am. Dec. 681); Nifflin *v.* Smith, 17 Serg. & R. 165. But if the partner, in whose name the firm's business is being transacted, is not engaged in any private business, the note or bill is presumed to be the obligation of the firm. Yorkshire Banking Co. *v.* Beason, L. R. 5 C. P. D. 109.

[2] Patch *v.* Wheatland, 8 Allen, 102; Thayer *v.* Smith, 116 Mass. 363; McGregor *v.* Cleveland, 5 Wend. 475; Filley *v.* Phelps, 18 Conn. 301; McKee *v.* Hamilton, 33 Ohio St. 7; Holden *v.* Bloxum, 35 Miss. (6 Geo.) 381. But if it is not issued in the course of business of the firm, but in prosecution of an outside transaction, this fact may be shown. Ridgeway *v.* Raymond, 82 Iowa, 582 (48 N. W. 944).

[3] Mason *v.* Rumsey, 1 Campb. 384; Ala. Coal M. Co. *v.* Brainerd, 35 Ala. 476; Tolman *v.* Hanrahan, 44 Wis. 133; Parnell *v.* Phillips, 55 Ga. 618. But see *contra*, Heenan *v.* Nash, 8 Minn. 407 (83 Am. Dec. 790).

payment to the firm or its indorsee, where either of them can prove *bona fide* ownership.[1]

§ 43. **Private corporations as parties.**— It is needless to state formally that private corporations have the power to execute bills, notes and other commercial paper, when that power is expressly given to them in their charters, or by the general laws of the State, under which they were incorporated. Nor is it necessary to explain why they have not the power, when they are expressly forbidden to exercise the power.[2] There is room for doubt and uncertainty, only in respect to the extent to which the power to issue bills and notes and other negotiable instruments can be inferred or implied from the character and express powers of the corporation. According to the English authorities, the power will only be implied when the corporation cannot without it carry on its business, or attain the end for which it was created, and it is not necessarily implied from the power to contract debts; since the power to issue negotiable instruments involves a power additional to the contraction of a debt, viz., the imposition upon the corporation of a liability to innocent indorsees for debts, which the corporation is not authorized to contract. The two powers are held to be entirely distinct and separate.[3] But while the distinction thus made by the English courts may be technically sound; in this country the reason for it is outweighed by the consideration, that a large part of the trade, manufacturing and mining of the country is conducted by corporations and the recognition of the distinction between the two powers would prove embarrassing to the commercial interests of the country. For that reason,

[1] Cannon *v.* Lindsey, 85 Ala. 198 (3 So. 676).

[2] But a mere prohibition of private corporations to issue negotiable paper as currency or circulating medium will not prevent them from becoming parties to bills and notes in the prosecution of their legitimate business. Atty.-Gen. *v.* Life & Fire Ins. Co., 9 Paige, 470; Mumford *v.* Am. L. Ins. Co., 4 N. Y. 463; Buckley *v.* Briggs, 30 Mo. 452; Western Cottage Organ Co. *v.* Reddish, 51 Iowa, 55 (49 N. W. 1048).

[3] Bateman *v.* Mid. Wales Ry. Co., L. R. 1 C. P. 499.

the distinction is generally ignored by the courts in the United States, and the broad proposition is laid down that, whenever a corporation can contract a debt for a certain object, it can put its obligation into the form of a negotiable note or bill, and assume the general liability of parties to negotiable paper.[1]

Unless the corporation is expressly authorized by its charter to become a party to accommodation paper, it cannot be bound by its signature to such paper, at least to the immediate payee; for accommodation paper cannot be considered to have been issued in the due course of business of an ordinary business corporation.[2] But if the accommodation paper has been signed by the officers of the corporation in the name of the corporation, so that the corporation is made to appear as a regular party to the bill, note or check, a *bona fide* indorsee or holder may enforce the obligation against the corporation.[3]

Indeed, it is the general rule, that, while between the original parties to the paper, a corporation can defend in a suit on its bills, notes and checks, by pleading that its issue was *ultra vires*,[4] this defense will not prevail against a

[1] Mahoney Mining Co. *v.* Anglo-Cal. Bk., 104 U. S. 192; Moss *v.* Averill, 10 N. Y. 449; Mechanics' Banking Ass'n &c. *v.* White Lead Co., 35 N. Y. 505; Hayward *v.* Pilgrim Society, 21 Pick. 270; Fay *v.* Noble, 12 Cush. 1; Monument Nat. Bank *v.* Globe Works, 101 Mass. 57 (3 Am. Rep. 322); Oxford Iron Co. *v.* Spradley, 46 Ala. 98; Ward *v.* Johnson, 95 Ill. 215; Lucas *v.* Pitney, 27 N. J. L. (3 Dutch.) 221; Davis *v.* W. Saratoga Bldg. Union, 32 Md. 285; Lebanon &c. Road Co. *v.* Adair, 85 Ind. 244; Auerbach *v.* LeSueur Mill Co., 28 Minn. 291 (9 N. W. 799); Am. Exch. Nat. Bank *v.* Oregon Pottery Co., 55 Fed. 265.

[2] West St. Louis Sav. Bank *v.* Shawnee Co. Bk., 95 U. S. 557; Bank of Genesee *v.* Patchin Bank, 13 N. Y. 309; *s. c.* 19 N. Y. 312; Erie Boot & Shoe Co. *v.* Eichenland, 127 Pa. St. 164 (17 A. 889); Monument Nat. Bank *v.* Globe Works, 101 Mass. 57 (3 Am. Rep. 322); Farmers' N. B. *v.* Sutton Mfg. Co., 52 F. 191; 6 U. S. App. 312; Beecher *v.* Dacy, 45 Mich. 92; Aetna Nat. Bank *v.* Charter Oak Ins. Co., 50 Conn. 167.

[3] Bird *v.* Daggett, 97 Mass. 494; National Banks *v.* Wells, 79 N. Y. 498; Hall *v.* Auburn Turnpike Co., 27 Cal. 255 (87 Am. Dec. 75); In re Jacoby-Micholas Co. (Minn. '97), 70 N. W. 1085; Am. Trust & Sav. Bank *v.* Gluck, *Id.*, and other cases cited in the preceding note.

[4] Credit Co. *v.* Howe Machine Co., 54 Conn. 357 (8 A. 472).

bona fide holder; the common rule of negotiable paper applying, that the indorsee takes the paper free from the equitable defenses that taint the character of the paper, while it is still in the hands of the original payee.[1] The power of a corporation, to become a payee or indorsee of a bill, note, or check, and to bind itself by an indorsement of the paper, is undoubtedly free from all doubt, where such note, bill or check is received by it in payment of some debt due to it.[2] And even where a corporation has exceeded its powers in taking commercial paper as payee or indorsee, because the transaction, which is settled by the delivery or transfer of the paper, is *ultra vires;* the primary and prior obligors, the maker, drawee, acceptor and prior indorser, cannot plead the *ultra vires* as a defense in the action brought against them by such corporation.[3]

Of course, in conformity with the general law of agency, in order that a corporation may be liable as a party to a bill or note, its name must have been affixed to the paper by a duly authorized agent. Any agent, expressly authorized by the board of directors, or other governing body, may bind the corporation by making it a party to a note or bill;[4] and so, also, where, by the custom of business, an

[1] Stoney *v.* Am. L. Ins. Co., 11 Paige, 635; Brown *v.* Donnell, 49 Me. 421 (77 Am. Dec. 266); Ellsworth *v.* St. Louis R. R. Co., 98 N. Y. 553; Hart *v.* Mo. &c. Ins. Co., 21 Mo. 91; Clark *v.* Lake Ave. &c. Sav. & L. Assn., 65 Hun, 625; Zabriskie *v.* Cleveland &c. R. R. Co., 23 How. 381; Supervisors *v.* Schenck, 5 Wall. 784; Grommes *v.* Sullivan, 81 Fed. 45; Pickaway Co. Bank *v.* Prather, 12 Ohio St. 497; McIntire *v.* Preston, 10 Ill. 48 (48 Am. Dec. 321); Merchants' Nat. Bank *v.* Lovitt, 114 Mo. 519 (21 S. W. 825).

[2] Planters' Bank *v.* Sharp, 6 How. 301; Lucas *v.* Pinney, 27 N. J. L. 221; Frye *v.* Lucker, 24 Ill. 180; Buckley *v.* Briggs, 30 Mo. 452; Savage *v.* Walsh, 26 Ala. 631.

[3] Farmington S. Bank *v.* Fall, 71 Me. 49; Farmers & M. Ins. Co. *v.* Needles, 52 Mo. 17; City of St. Louis *v.* Shields, 62 Mo. 247; Nat. Pemberton Bk. *v.* Porter, 125 Mass. 333 (28 Am. Rep. 235); Massey *v.* Citizens Bldg. Ass., 22 Kan. 624; Greener *v.* Ulerey, 20 Iowa, 266; Poock *v.* Lafayette Bldg. Assn., 71 Ind. 357; Nat. Bank *v.* Matthews, 98 U. S. 621.

[4] National Spraker Bank *v.* Treadwell Co., 80 Hun, 362; Grant *v.* Treadwell Co., 82 Hun, 591, holding that a substantial conformity with

officer has the implied power to so bind his corporation, no express power is required; as, for example, the cashier of a bank.[1]

§ 44. **Form of signature by agents of corporations.**— In the proper execution of a note or bill, in the name of and for a private corporation, the corporate name should be used in the body of the instrument, whether the corporation is maker of a note, or drawer, or drawee of a bill, or a payee or indorsee of either. And where this precaution is observed, the obligation or right of the corporation as a party to such paper is unquestionable, it matters not how informal the signature by the agent may be. In such a case, merely affixing the official title to the agent's signature will be sufficient to make it a good execution of a corporate note or bill or of an indorsement;[2] although the better and proper form of the signature would be the corporate name *per* the officer, as, for example, "The A. B. Company per C. D., Treasurer." Where the name of the corporation does not appear in the body of the instrument, which is not an unusual occurrence, clearer evidence is generally required in the signature of the paper of its being a corporate obligation, so as to bind the corporation. In this case, the signature should be as it is given above. But the authorities seem generally to hold that when a note reads "We (or I) promise to pay," and signed "C. D. for (in behalf of, on account of, by the order of, for the use of) the A. B. Com-

the requirement of the by-laws as to the power of agents will be sufficient to bind the corporation.

[1] West St. Louis &c. Bk. *v.* Shawnee Bank, 95 U. S. 557; Potter *v.* Merchants' Bank, 28 N. Y. 641 (86 Am. Dec. 273); Mead *v.* Merchants' Bank, 25 N. Y. 143; Cook *v.* Stat. Nat. Bank, 52 N. Y. 96 (11 Am. Rep. 667); Cooper *v.* Curtis, 30 Me. 488; State Bank *v.* Kaine, 1 Ill. 45; Sturgis *v.* Bank of Circleville, 11 Ohio St. 153 (78 Am. Dec. 296); Ballston Spa Bank *v.* Marine Bank, 16 Wis. 120. But he has no implied authority to bind bank by accommodation indorsements. Nat. Bank of Commerce *v.* Atkinson, 55 Fed. 465.

[2] Ellis *v.* Pulsifer, 4 Allen, 165; Jefts *v.* York, 4 Cush. 371 (50 Am. Dec. 791); *s. c.* 10 Cush. 392; Hall *v.* Crandall, 29 Cal. 567 (89 Am. Dec. 64); Liebscher *v.* Kraus, 74 Wis. 387 (43 N. W. 166). But see Frankland *v.* Johnson, 147 Ill. 520 (35 N. E. 480).

pany," the corporation is bound and not the agent individually.[1] But where no such prepositions are employed in the signature, to indicate that the agent or official is acting in behalf of and as agent of the corporation, a note or bill, signed "C. D., Treasurer of the A. B. Company," would be held by the weight of authority in this country to be the individual obligation of C. D., the suffix of his signature, "Treasurer of the A. B. Company," being held to be a mere *descriptio personae*, and not to evince the intention to make the corporation a party to the note or bill.[2]

It is probable that all the courts agree in holding that, where the name of the corporation does not appear either in the body of the instrument or in the signature, it is not a corporate obligation but the individual obligation of the agent or officer of the corporation, although he affixes to his signature the title of his office.[3]

[1] Jefts *v.* York, 4 Cush. 371 (50 Am. Dec. 791); 10 Cush. 392; Bradlee *v.* Boston Glass Mfg. Co., 16 Pick. 347; Walker *v.* Bank of State of N. Y., 9 N. Y. 582; Lindus *v.* Melrose, 3 H. & N. 177; Harvey *v.* Irvine, 11 Iowa, 82; Gillett *v.* New Market Sav. Bank, 7 Bradw. 499; Neptune *v.* Paxton, 15 Ind. App. 284 (43 N. E. 276); Cresswell *v.* Holden, 3 MacArth. 579.

[2] Fiske *v.* Eldridge, 12 Gray, 474; Tucker Mfg. Co. *v.* Fairbanks, 98 Mass. 101; Casco Nat. Bk. *v.* Clark, 139 N. Y. 307 (34 N. E. 908); Moss *v.* Livingston, 4 N. Y. 208; First Nat. Bank *v.* Stuetzer, 80 Hun, 435; Williams *v.* Second Nat. Bank, 83 Ind. 237; McNeil *v.* Shober &c. Co., 144 Ill. 238 (33 N. E. 31); Tilden *v.* Barnard, 43 Mich. 376 (38 Am. Rep. 197); Day *v.* Ramsdell, 90 Iowa, 731 (57 N. W. 630); Hately *v.* Pike, 162 Ill. 241 (44 N. E. 441); Smith *v.* Alexander, 31 Mo. 193; Chamberlain *v.* Pacific Wool &c. Co., 54 Cal. 103; Mathews *v.* Dubuque &c. Co., 87 Iowa, 246 (54 N. W. 225); Moffett *v.* Hampton (Ky.), 31 S. W. 881. See Harris *v.* Coleman & Ames &c. Co., 58 Ill. App. 366. But see *contra*, Hovey *v.* Magill, 2 Conn. 680; Johnson *v.* Smith, 21 Conn. 627; Kennedy *v.* Knight, 21 Wis. 340 (94 Am. Dec. 543); Benham *v.* Smith, 53 Kan. 495 (36 P. 997).

[3] Duvall *v.* Craig, 2 Wheat. 56; Pease *v.* Pease, 35 Conn. 131 (95 Am. Dec. 225); Towne *v.* Rice, 122 Mass. 67; Adams *v.* Kennedy, 175 Pa. St. 160 (34 A. 659); Trustees of Cahokia *v.* Rautenberg, 88 Ill. 219; Haines *v.* Nance, 52 Ill. App. 406. But where the note reads: "We as trustees, and not individually, promise," etc., all individual liability is necessarily precluded, whatever may be the form of signature. Shoe Leather Nat. Bank *v.* Dix, 123 Mass. 148 (25 Am. Rep. 49).

§ 45. **Commercial paper of corporations under seal.**— As has elsewhere[1] been explained, the general rule of the law of commercial paper is that it must not be sealed, in order to be negotiable. But, according to the early common law, a corporation could not make a lawful binding contract, except under its corporate seal; and for that reason, a promissory note or bill of exchange issued by a corporation had to be impressed with the corporate seal. Following the general rule, that the seal destroyed the negotiability of the instrument, a valid corporate note or bill was treated as having in every respect the legal effect of a bond or covenant.[2] But it is now very generally held: *first*, that a corporation may make any contract or execute any legal instrument, without using its corporate seal, wherever this may be done by natural persons;[3] and *secondly*, that if the seal is used by a corporation in the execution of what would otherwise be a negotiable instrument, the use of the seal will not destroy the negotiable character of the paper, unless that intention is shown. This is true, not only when the paper has in every other respect the form of an ordinary promissory note or bill of exchange, but also when it is a coupon bond.[4]

§ 46. **Drafts or warrants of one officer of the corporation on another.**— It is a comparatively common custom in

[1] *Ante*, § 5.

[2] See Clark *v.* Farmers' &c. Mfg. Co., 15 Wend. 256; Rawson *v.* Davidson, 49 Mich. 607; Osborn *v.* Kistler, 35 Ohio St. 99; Sidle *v.* Anderson, 45 Pa. St. 464.

[3] Bank of Columbia *v.* Patterson, 7 Cranch, 305; Bank of U. S. *v.* Dandridge, 12 Wheat. 64; Many *v.* Beekman Iron Co., 9 Paige, 188; Colson *v.* Arnot, 57 N. Y. 253; Whitford *v.* Laidler, 94 N. Y. 145; Town of New Athens *v.* Thomas, 82 Ill. 259; Buckley *v.* Briggs, 30 Mo. 452.

[4] White *v.* Vermont &c. R. R. Co., 21 How. 575; Comrs. Knox Co. *v.* Aspinwall, 21 How. 539; Clark *v.* Iowa City, 20 Wall. 583; Chapin *v.* Vt. &c. R. R. Co., 8 Gray, 575; Haven *v.* Grand Junction R. R. Co., 109 Mass. 88; Jackson *v.* Myers, 43 Md. 452; Mason *v.* Frick, 105 Pa. St. 162 (51 Am. Rep. 191); Smith *v.* Clark County, 54 Mo. 58; Mackay *v.* St. Mary's Church, 15 R. I. 121 (23 A. 108); Colson *v.* Arnot, 57 N. Y. 253 (15 Am. Rep. 496); Evertson *v.* Nat. Bank, 66 N. Y. 14 (23 Am. Rep. 9). See Tiedeman Com. Paper, Chap. XXV, for a discussion of the characteristics of coupon bonds.

the dealings of a private corporation for one of its officers,— its president or secretary, for example,— to draw on the treasurer in favor of some person to whom the corporation has become indebted. If the draft or warrant contains all the essentials of negotiable paper, there can be very little doubt that the warrant is a negotiable bill of exchange, in which the same party is drawer and drawee; and such a warrant may, like all other such irregular instruments,[1] be treated either as an accepted bill of exchange or as a promissory note. Since the warrant is drawn by the corporation on itself, the drawer and drawee being practically the same person, it has been generally held that it is not necessary to make a formal presentment for acceptance or payment, in order to hold the corporation liable.[2]

§ 47. **Governments as parties.**— The power of the governments, both national and State, to become parties to negotiable instruments, as drawer, acceptor and maker, is clearly and fully recognized.[3] It is a common thing for these governments to issue coupon bonds, treasury notes and bills of credit, which are essentially nothing more than promissory notes.[4] And the courts of the United States have recognized the power of a foreign government to become a party to a bill of exchange.[5] But since governments do not, in the ordinary administration of public affairs, resort to the issue or use of negotiable paper; in order that such paper may be lawfully issued, with the government as a party to the same, the officer of the government, who issues it, must have an express authority from the

[1] *Ante*, § 16.

[2] Fairchild *v.* Ogdensburg &c. R. R. Co., 15 N. Y. 337 (69 Am. Dec. 606); Tripp *v.* Swanzey Mfg. Co., 13 Pick. 291; Shaw *v.* Stone, 1 Cush. 228; Indiana &c. R. R. Co. *v.* Davis, 20 Ind. 6 (83 Am. Dec. 303); Wetumpka &c. R. R. Co. *v.* Bingham, 5 Ala. 657. But see Sioux Nat. Bank *v.* Cudahy Packing Co., 63 Fed. 805.

[3] Poindexter *v.* Greenhow, 114 U. S. 270; U. S. *v.* Bank of Metropolis, 15 Pet. 377; U. S. *v.* Central Nat. Bank, 6 Fed. Rep. 134; State ex rel. Plock *v.* Cobb, 64 Ala. 127.

[4] See Tiedeman Com. Paper, Chapters XXIV and XXV.

[5] Jones *v.* LeTombe, 3 Dall. 384.

legislative department of the government to negotiate the bond or other negotiable instrument; except so far as the power to issue negotiable paper, or to make the government a party to it, may be implied as being necessary to carry out some express power. But such an implication will rarely be considered as necessary. It has thus been held that no officer of the United States government has the implied authority to bind the government by his acceptance of a bill, although the bill is drawn against an acknowledged indebtedness of the government to the drawer.[1]

§ 48. **Municipal or public corporations as parties.**— Under the terms, municipal or public corporations, are included, not only cities, but every other local government which are instituted under the laws of the States, viz.: towns, counties, school districts and townships. In every case, the powers of these public corporations are limited by the provisions of the charters under which they have been organized. The general rule of interpretation is, that the municipal or public corporation can exercise only those powers, which are expressly granted by the charter, or which are implied, because they are plainly necessary in carrying out the powers which are expressly granted.[2] In answering the question, how far and when can a municipal corporation be bound as a party to a negotiable instrument, we find no difficulty where the power is expressly granted. There can be no question of the power of the legislature to authorize a municipal corporation to become a party to a bill, note or other commercial paper. The difficulty arises only when the power is claimed to be implied. Two questions are here involved: *First*, whether a municipal corporation has the implied power to borrow money and bind the corporation by the obligation thus assumed; or whether such corporation can only obtain funds by means of taxation: *secondly*, whether, if the implied power to borrow money be con-

[1] The Floyd Acceptances, 7 Wall. 666.

[2] See Tiedeman's Municipal Corp., Chap. VIII, IX.

ceded, it includes the power to give in evidence of the money borrowed a negotiable instrument, a note, bill or bond.

On the first question, the authorities are divided. Some of the cases maintain that the ordinary measure for providing a city or county with the means of carrying on its work is taxation; and if the borrowing of money becomes necessary, a special grant of authority should be required.[1] But the current of judicial opinion is decidedly in favor of the implied power of municipal and public corporations of all kinds to borrow money, within the express limitations of the charter, general laws and constitution of the State.[2] But it must be for a public purpose that the money is borrowed.[3] And as a consequence of the general prevalence of municipal extravagance, the power to borrow money is now very generally expressly granted, and subjected to express limitations as to the amount of indebtedness which might be incurred by borrowing money. The ordinary limitation is a specified percentage of the assessed value of private property subject to taxes.[4]

Conceding the power of a municipal corporation to borrow money, the question still remains, whether it can, in borrowing money, bind itself by becoming a party to negotiable paper, so that a *bona fide* holder can recover on it, although there are defenses which may be set up against the immediate parties. Some of the authorities hold that this power can be exercised only when the power to bor-

[1] Mayor of Nashville *v.* Ray, 19 Wall. 468; Hackettstown *v.* Swackhamer, 37 N. J. L. (8 Vroom) 191; Knapp *v.* Hoboken, 38 N. J. L. (9 Vroom) 371; Gause *v.* City of Clarksville, 5 Dill. C. C. 165; Mayor of Wetumpka *v.* Wetumpka Wharf Co., 63 Ala. 611; Dively *v.* Cedar Falls, 21 Iowa, 365.

[2] Williamsport *v.* Com., 84 Pa. St. 487 (24 Am. Rep. 708); Ketchum *v.* Buffalo, 14 N. Y. 356; Clarke *v.* School District, 3 R. I. 199; Galena *v.* Corwith, 48 Ill. 423 (95 Am. Dec. 557); Clarke *v.* City of Des Moines, 19 Iowa, 199 (87 Am. Dec. 423); Bank of Chillicothe *v.* Mayor of Chillicothe, 7 Ohio, Pt. II, p. 31 (30 Am. Dec. 185); Mills *v.* Gleason, 11 Wis. 470 (78 Am. Dec. 721).

[3] See Tiedeman's Mun. Corp., §§ 137, 141, 175, 176, 184, 188.

[4] See Tiedeman's Mun. Corp., § 189a.

row money is expressely granted.[1] The general trend of judicial opinion has, until lately, been altogether in favor of the implied power of the municipal corporation, to become parties to a strictly negotiable instrument.[2] But recently, the United States Supreme Court has held that the power of a municipal corporation, to bind itself as a party to negotiable paper, is not to be implied from the power to borrow money, whether the latter power be express or implied.[3] This must, however, be taken as meaning only that the doctrine of *ultra vires* will be a good defense, even as against *bona fide* holders. And where the proceeds of the negotiation of the unauthorized issue of negotiable paper are received by the municipal corporation, it is liable to the holder of the paper for the amount so received.[4]

The customary form of negotiable paper, when issued by municipal corporations, is that of a coupon bond, or scrip;[5] and it is rarely the case that a municipal or public corporation becomes a party to an ordinary bill or note. The only municipal instrument which approximates in character these common kinds of negotiable paper, is the warrant, given by one officer of a municipal corporation on

[1] Mayor of Nashville *v.* Ray, 19 Wall. 476; Hackettstown *v.* Swachhamer, 37 N. J. L. (8 Vroom) 191.

[2] United States *v.* U. P. R. R. Co., 91 U. S. 72; Cromwell *v.* Lac. Co., 96 U. S. 51; Commissioners *v.* Block, 99 U. S. 686; Ottawa *v.* First Nat. Bank, 105 U. S. 342; Ackley School Dist. *v.* Hall, 113 U. S. 135; New Providence *v.* Halsey, 117 U. S. 336; Williamsport *v.* Com., 84 Pa. St. 487 (24 Am. Rep. 208); Starin *v.* Genoa, 23 N. Y. 451; Curtiss *v.* Leavitt, 15 N. Y. 356; Goodman *v.* Ramsey Co., 11 Minn. 31; Galena *v.* Corwith, 48 Ill. 423 (95 Am. Dec. 557); Boss *v.* Hewett, 20 Wis. 460; Crittenden Co. *v.* Shanks, 88 Ky. 475 (11 S. W. 468); Mayor *v.* Inman, 57 Ga. 370; Tucker *v.* Raleigh, 75 N. C. 267; Newgass *v.* New Orleans, 42 La. Ann. 163 (7 So. 565).

[3] Merrill *v.* Monticello, 138 U. S. 673; Brenham *v.* Germ.-Am. Bank, 144 U. S. 173; *s. c.* 549, reversing 35 Fed. Rep. 185, and overruling Rogers *v.* Burlington, 3 Wall. 654; Mitchell *v.* Burlington, 4 Wall. 270, and distinguishing Dwyer *v.* Mackworth, 57 Tex. 245.

[4] Hoag *v.* Greenwich, 133 N. Y. 152 (30 N. E. 842).

[5] For discussion of coupon bonds in general, see Tiedeman's Com. Paper, Chap. XXV, and municipal securities, Tiedeman's Mun. Corp., Chap. XI.

the treasurer or other officer of such corporation, directing him to pay a sum of money due. The general trend of authority in this country is to treat these warrants as of the character of vouchers; and, since their value is not materially enhanced by treating them as negotiable paper, to deny to them the characteristics of negotiability, at least so far as to enable a *bona fide* holder to recover on the warrant, where the officer has exceeded his authority in issuing the warrant.[1]

§ 49. **Fiduciary parties and personal representatives as parties.**—Trustees and guardians have not the power to bind the estates, which they have in charge, by any note or bill which they may attempt to issue in their representative capacity; and they will be personally liable on any such bill or note, even though they stipulate in the instrument that they are acting as trustee or guardian.[2] But, as between the guardian, a trustee and the ward or *cestui que trust*, it may be shown that the consideration for such bill or note redounded to the benefit of the estate.[3] This is particularly true in cases, in which the trustee has the power to borrow money for the benefit of the estate. In such cases, the doctrine of the text may be taken as meaning, that the personal liability of the trustee stands between the *bona fide* holder and the trust estate, to protect both against his unauthorized exercise of the power to borrow money.[4] But where a note or bill is made payable to a

[1] District of Columbia *v.* Cornell, 130 U. S. 655; Wall *v.* Monroe, 103 U. S. 559; Claiborne Co. *v.* Brooks, 111 U. S. 400; Emery *v.* Mariaville, 56 Me. 315; East Union *v.* Ryan, 86 Pa. St. 459; People *v.* Johnson, 100 Ill. 537 (39 Am. Rep. 63); State *v.* Huff, 63 Mo. 288; State *v.* Liberty, 22 Ohio St. 44; Burlington &c. R. R. Co. *v.* Clay Co., 13 Neb. 367 (13 N. W. 628); Oatman *v.* Taylor, 29 N. Y. 657; Knapp *v.* Hoboken, 38 N. J. L. (9 Vroom) 371; Harris *v.* United States, 27 Ct. of Cl. 177 (U. S. Treasury warrants).

[2] Towne *v.* Rice, 122 Mass. 67; Hill *v.* Banister, 8 Cow. 31; Taylor *v.* Shelton, 30 Conn. 122; Storrs *v.* Flint, 46 N. Y. Super. Ct. 498; Robertson *v.* Banks, 1 Smedes & M. 666; McGavoch *v.* Whitfield, 45 Miss. 452; Shiff *v.* Shiff, 20 La. Ann. 269. But see Gandy *v.* Babbitt, 56 Ga. 640.

[3] Poole *v.* Williams, 42 Ga. 539; Lapeyre *v.* Weeks, 28 La. Ann. 665.

[4] See U. S. Trust Co. *v.* Roche, 116 N Y. 120 (22 N. E. 265); Rogers

guardian or trustee, described as such, and for the benefit of the trust estate; and the note or bill is transferred by indorsement; some of the authorities hold that, on account of the express description of the payee as guardian or trustee, the indorsee cannot claim to be a *bona fide* holder; and not only will he not be able to hold the guardian or trustee personally liable, but he takes it subject to all defenses, which may arise from a diversion of such note or bill from the purposes of the trust.[1] But where the indorsee has no actual notice of a breach of trust, and it is a *bona fide* purchase for cash of such a note or bill, the indorsee is a *bona fide* holder, and takes the paper free from any defenses, growing out of any secret diversion of trust funds, even though the instrument is made payable to the guardian or trustee, described as such.[2] Where the note or bill is made payable to the guardian or trustee, without describing him as such, there can be no question, not only as to the *bona fide* ownership of the indorsee, but also as to the personal liability of the guardian or trustee on his indorsement.[3] And it has been held that a trustee will be individually liable on a note, payable to him as trustee, when he transfers it by indorsement; even though the will, by which the trust estate was established, empowered him to make such transfer by indorsement, unless he inserts in the indorsement an express stipulation that he is not individually liable.[4]

The same principles apply in determining the liability of

v. Rogers, 111 N. Y. 228 (18 N. E. 636); Burroughs *v.* Bunnell, 70 Md. 18 (16 A. 447); Pike *v.* Baldwin, 68 Iowa, 263 (26 N. W. 441); Miller *v.* Redwine, 75 Ga. 130.

[1] Sturtevant *v.* Jaques, 14 Allen, 523; Shaw *v.* Spencer, 100 Mass. 382 (97 Am. Dec. 107); Baughn *v.* Shackleford, 48 Miss. 255; Smith *v.* Dibrell, 31 Tex. 239 (98 Am. Dec. 526); Nickerson *v.* Gilliam, 29 Mo. 456 (77 Am. Dec. 583).

[2] Fountain *v.* Anderson, 33 Ga. 372; Westmoreland *v.* Foster, 60 Ala. 448; Thornton *v.* Rankin, 19 Mo. 193.

[3] Knowlton *v.* Bradley, 17 N. H. 458 (43 Am. Dec 609).

[4] Roger Williams Nat. Bank *v.* Groton Mfg. Co., 16 R. I. 504 (17 A. 170).

an executor or administrator, as a party to a bill or note, signed by him in his representative capacity. He is not authorized to bind the estate by any note or bill, which he may execute, although it may be issued in settlement of a debt due by the estate. He is individually bound as maker of such a note, or drawer of such a bill, even though the signature is stated in the most explicit manner to have been made in his representative capacity.[1] If there is no fresh consideration for the executor's note, it is held, as against every one but a subsequent *bona fide* holder, that he will not be liable beyond the assets which he actually receives from the estate of the decedent.[2] And his liability will be limited to the amount of such assets, wherever he expressly limits his obligation to payment out of the assets of the estate.[3]

The executor or administrator is also personally liable as acceptor of a bill, drawn against him as such, even though he adds to his signature his official designation, at least as against *bona fide* holders.[4] But where the drawer and payee, and particularly the latter, were informed at the time of acceptance, that the executor accepted in his representative capacity, and only undertook to pay the bill out of whatever assets of the estate may be realized, such payee cannot hold the accepting executor beyond the amount of such assets.[5]

Where the executor or administrator is the payee of a note or bill, as long as he does not transfer it by indorse-

[1] Walker *v.* Patterson, 36 Me. 273; Funderburk *v.* Gorham, 46 Ga. 296 (note given for property purchased for estate); Bank of Troy *v.* Topping, 13 Wend. 557; Rittenhouse *v.* Ammerman, 64 Mo. 197 (27 Am. Rep. 215); Kessler *v.* Hall, 64 N. C. 60; Christian *v.* Morris, 50 Ala. 585.

[2] Davis *v.* French, 20 Me. 21 (37 Am. Dec. 36); Byrd *v.* Holloway, 6 Smedes & M. 199.

[3] Serle *v.* Waterworth, 4 Mees. & W. 9; Bank of Troy *v.* Topping, 9 Wend. 273; Kirkman *v.* Benham, 28 Ala. 501. But there must be something more than signing his name as "executor" or "administrator." Tryon *v.* Oxley, 3 Green (Iowa), 289.

[4] Tassey *v.* Church, 4 Watts & S. 141 (39 Am. Dec. 65).

[5] Schmittler *v.* Simon, 114 N. Y. 176 (21 N. E. 162).

ment, he may treat it as his own private property or include it in the assets of the estate; and maintain an action on it in his personal or representative capacity, according to his election.[1] The personal representative has the right in any case to transfer such paper by indorsement.[2] But he will be individually liable on such an indorsement, unless he makes the indorsement without recourse to himself individually.[3]

ILLUSTRATIVE CASES.

Noel *v.* Kinney, 106 N. Y. 74 (12 N. E. 351).
Barrett *v.* Dodge, 16 R. I. 740 (19 A. 530).
Merchants' Nat. Bank *v.* Citizens' Gaslight Co., 159 Mass. 505 (34 N. E. 1083).
Casco Nat. Bank *v.* Clark, 139 N. Y. 307 (34 N. E. 908).
Frankland *v.* Johnson, 147 Ill. 520 (35 N. E. 480).
Sparks *v.* Despatch Transfer Co., 104 Mo. 531 (15 S. W. 417).
Schmittler *v.* Simon, 114 N. Y. 176 (21 N. E. 172).

Liability of Wife on Promissory Note — A Partner with Her Husband.

Noel *v.* Kinney, 106 N. Y. 74 (12 N. E. 351).

DANFORTH, J. The action is upon a note signed "J. P. Kinney & Co.," payable to the order of plaintiffs at bank, for $505, value received. The complaint contains allegations usual in such cases, and sufficient to charge the defendants as partners under the name affixed to the note. Fredericka M. Kinney alone answered, and her sole defense is that at the time stated she was a married woman, and that the note was executed and delivered by her husband. But there is no allegation that it was made without her knowledge and consent, nor that it was made with-

[1] Bogert *v.* Hertell, 4 Hill, 503; Fry *v.* Evans, 8 Wend. 530; Litchfield *v.* Flint, 104 N. Y. 543 (11 N. E. 58) (treated as his personal property); Thomas *v.* Relfe, 9 Mo. 377; Clampitt *v.* Newport, 8 La. Ann. 124; Cravens *v.* Logan, 7 Ark. 103 (will by administrator *de bonis non*).

[2] Neuhoff *v.* O'Reilly, 93 Mo. 164 (6 S. W. 78); Makepeace *v.* Moore, 11 Ill. 474; Taylor *v.* Surget, 14 Hun, 116; Clark *v.* Moses, 50 Ala. 326. Where a note is payable to executors or administrators, and there are more than one, all must join in the indorsement. Smith *v.* Whitney, 9 Mass. 334; Johnson *v.* Mangum, 65 N. C. 146; Sanders *v.* Blain, 6 J. J. Marsh. 446 (22 Am. Dec. 86). But see Bogert *v.* Hertell, 4 Hill, 492.

[3] Forster *v.* Fuller, 6 Mass. 58; Livingston *v.* Gaussen, 21 La. Ann. 286 (99 Am. Dec. 731).

out her authority. Upon the trial the plaintiff put the note in evidence, and the defendant proved her marriage with the other defendant. But there was evidence from which the jury might have found that she was the owner of improved real estate in the city of Brooklyn; that the consideration of the note was the purchase price of mirrors placed in houses built upon her land; and that the mirrors were unpaid for. The note was fairly taken, and the consideration delivered upon the representation by the husband that the wife was the sole owner of the property, and that the name of J. P. Kinney & Co. was used as mere matter of convenience in transacting her business. It does not appear that there was any business except in relation to the houses. No question was made as to the authority of defendant's husband to execute the note, nor as to the truth of his representations.

The defendant Fredericka moved to dismiss the complaint upon the ground that as to her the note was invalid, "its form," as her counsel stated, "showing it was not given in respect to her separate business or estate." The trial judge directed a verdict for the plaintiff, subject to the opinion of the court. It was so rendered, but, on motion of the defendant's counsel, afterwards set aside by the same judge, and judgment ordered for the defendant. Exceptions taken by the plaintiffs to this ruling were directed to be heard in the first instance at general term, judgment in the meantime to be suspended. The general term overruled the exception, and ordered judgment for the defendant.

It is obvious that the contract in fulfillment of which the note was given was of value to the defendant, for by it she acquired articles for the improvement of her property. She retains those articles, and has so far avoided payment upon the ground that she and her husband, upon contracting and consummating marriage, became one person, and so incapable of thenceforth contracting one with the other; that, therefore, they could not be partners, and, as the contract sued on was in form a copartnership contract, it could not be enforced against her. If this is the present rule of law, then the statutes which enable the woman to acquire and hold property, to bargain, sell, assign and transfer it, to carry on any trade or business, and perform any labor or service on her own account, and which protect her in the enjoyment of her earnings from her trade, business, labor or services, and permit her to use and invest those earnings, are effectual only so far that she may, alone or jointly with any person or persons save her husband, derive profit and increase from her work, and gain from the use of her estate. If they are to be so limited in her favor, they may easily, as in this instance, become not merely enabling statutes for her benefit, but also in her hands instrumentalities of fraud.

Upon the precise question presented the opinion of the court below assumes that the decisions of other courts are conflicting; but we are referred to no case in this court where a woman has successfully asserted her coverture as a defense to an action for

the price of goods purchased by her, and I am unable to see why, as against creditors, she should be permitted to interpose the mere form of her promise as an obstacle to their recovery. It is settled that the things which the statute above referred to permit her to do in person she may also do by another as her agent. This is necessarily so, for she is allowed to act in respect to them as if unmarried; and it cannot be doubted that the improvement of her land, or the management of her personal property, whether for preservation or business, may be conducted by her by means of any agency which any other owner of property might employ, and that the produce and increase thereof will be hers. Knapp *v.* Smith, 27 N. Y. 278; Abbey *v.* Deyo, 44 N. Y. 344. So she may do those things through her husband as her agent. Abbey *v.* Deyo, supra; Rowe *v.* Smith, 45 N. Y. 230. She may also have such a community of interest with him in relation to real estate as will render her liable for his frauds relating to it; and when he, professing to act as her agent, makes false representations, although without her knowledge, and she receives the proceeds, she cannot retain the fruits of his fraud. Krumm *v.* Beach, 96 N. Y. 398.

Again, as to all contracts relating to her separate estate, or made in the course of her separate business, she stands at law on the same footing as if unmarried, and can therefore make negotiable paper which will be governed by the law-merchant, and can be sued upon in the ordinary way by general complaint, and without special statements. Frecking *v.* Rolland, 53 N. Y. 422. Nor can she escape liability because she and her husband are joint makers of the note sued on. In Frecking *v.* Rolland, supra, the action was upon a promissory note signed by the defendants, who were husband and wife. He set up usury, and she set up coverture. The court directed a verdict for the wife, and the jury gave a verdict against the husband. The creditor appealed. The general term affirmed the verdict in favor of the wife, and the creditor appealed to this court. Against the appeal it was argued (1) that being a married woman, she was not liable for the note in suit; (2) that the complaint, being general and not specific, was insufficient to charge her property. Neither objection prevailed, and the judgment in her favor was reversed. There the husband acting for himself, and as the agent of his wife, borrowed money with which to pay for a factory bought by her. The money was loaned to them, and was in part so applied. The note was given for the money loaned, and for services. The court, in answering the defendant's objections, show that the capacity of a married woman to make contracts relating to her separate business is incident to the power to conduct it, for the latter would be barren and useless if disconnected with the right to conduct it in the way and by the means usually employed. In the case cited she became a joint contractor with her husband, but she was as much bound to perform the joint engagement as if the undertaking had been several, and she did not escape liability because her

joint contractor was her husband. It was not necessary to inquire in that case whether the one paying could obtain contribution from the other, nor is it necessary to go into that question here. In that case both undertook to pay the creditor; in this case both undertook to pay the creditor. Can it make a difference in the measures of liability that in one case the married woman entered in her own name and her husband in his name in the execution of a joint obligation, and in the other case a name which represents also joint liability, but which may in effect also be several?

Partners are at once principals and agents. Each represents the other, and if in the relation of partnership, there are obligations which a married woman cannot enforce against her husband, or the husband against the wife, they involve no feature of the present action, which asserts only the obligation of a debtor to discharge her debt, or the obligation of a promisor to fulfill her promise. More like the present case is that of Scott *v.* Conway, 58 N. Y. 619, where, in an action for the price of labor and materials supplied to a theater carried on by Sarah T. Conway and her husband, Frederick B., under the name of "Mrs. B. F. Conway's Brooklyn Theater," and in which the wife and husband were jointly interested, it was held to be no defense, against one who dealt with her in ignorance of the partnership, that she had a dormant partner, and that the rule was not changed by the fact that the partner was her husband. In Bitter *v.* Rathman, 61 N. Y. 512, it was held that a married woman who, in secret trust for her husband, becomes a member of a copartnership, is to be regarded as the owner of the interest she represents, and might maintain an action for the dissolution of the copartnership, and for an accounting. The defendant in that case denied that she was a partner, and claimed that he alone was interested in the business; claiming that, being a married woman, she could not in law be his partner. The court held otherwise, and also that, having suffered herself to be regarded by the public as a partner, she was liable as such to the creditors of the ostensible firm, although it might be otherwise as regarded her husband and his creditors, but as to any liabilities of the ostensible firm she would be entitled to protection as against the defendant and her husband.

It would seem therefore that, by becoming a partner either with a husband or another person, a married woman loses no right of property. And no principle is suggested upon which her estate can be increased at the expense of creditors, nor how either in her own name, or in her own name and that of another, or with another, she can purchase goods on credit to the advantage of her separate estate, and not become liable for its payment. In Coleman *v.* Burr, 93 N. Y. 17, cited by the appellant, the sole question was whether the conveyance of property by the husband to his wife was sustained by a consideration good as against his creditors who impeached it. Here the wife was as capable of contracting as if she had been unmarried,— as capable of adding to her estate by fresh

acquisitions; and she should not be permitted to escape payment by joining to her own name that of her husband, or by combining the two into a firm or partnership name. It was by that name she chose to contract, and, as between herself and creditor, she is bound by it. Individuals may be liable as partners to third persons, while, as between themselves, they are not.

Here, then, the question is not between husband and wife. Assume that as to and with him she has no capacity, it by no means follows that she shall not be held upon a contract made by him upon a consideration moving to her, where a third person, who parted with that consideration in reliance upon the husband's apparent agency, seeks to enforce the contract. If the adoption of a firm name was a mere contrivance to carry on the business jointly, and at the same time to put the property acquired and added to the wife's separate property out of the reach of creditors dealing with either *bona fide* as the partner of the other, it should not be permitted to have that effect. If, as the testimony shows, the wife was the sole owner of the property, that the husband had no interest in it, but that for convenience they were doing her business in the name of J. P. Kinney & Co., her liability for a debt contracted in that name is entirely consistent with the fact, if it be a fact that, as between the parties themselves, no partnership exists. This is so, although the plaintiff alleges in the complaint that the defendants are partners, and that allegation is not denied. For the purposes of the action it may be true. The plaintiff gave credit to them as such, but the goods he sold were intended by them to be annexed to the wife's separate estate, and they were so annexed. If the arrangement was valid between all parties, there is no pretense of a defense. If invalid only as between the defendants, the wife, who received the fruits of the transaction, cannot, as against a creditor, assert its invalidity. Although married, she may be estopped by her acts and declarations in any matter in respect of which she is capable of acting *sui juris*. Bodine *v.* Killeen 53 N. Y. 93. In this instance the plaintiff proved the contract, that it was made by her authorized agent, and that it had reference to the improvement and benefit of her separate estate. She had capacity to do all these things, and, if the arrangement which led to the use of her husband's name as joint promisor or partner was beyond her power to enter into, she must meet that liability without regard to any question whether her husband is also liable, or as to what rights of indemnity or otherwise she might have against him. She was a principal, and he was her agent. He neither exceeded his power, nor were her acts to his prejudice, and if, by reason of any technical incapacity, they could not contract with each other or together, as constituting that artificial entity, a firm of copartnership (a question we do not decide), she is liable, and the contract enforcible against her in favor of the plaintiff, whose property has been added to her estate upon the strength of a promise made in her name by her authorized agent.

We think the court erred in directing judgment for the defendant. It should be reversed, and the plaintiff have judgment upon the verdict. All concur.

Partnership Note — Conflict of Law — What Constitutes Sufficient Delivery.

Barrett *v.* Dodge, 16 R. I. 740 (19 A. 530).

MATTESON, J. This is an action of *assumpsit* on two promissory notes. The first is for $1,106.12, dated at New York, December 28, 1886, and made payable to the order of William E. Dodge & Son, 12 months after date. The second is for $200, dated at Baltimore, Md., January 27, 1887, and also made payable to the order of William E. Dodge & Son, 4 months after date, with interest at 6 per cent per annum. The plaintiff claimed that both notes were indorsed and delivered to him by the payees before maturity, for their full value on account of his guaranty of the indebtedness of the payees to Barrett Bros. & Co., of which firm the plaintiff was a member. The defense was that the notes were so indorsed and delivered after maturity, and that the note for $1,106.12 had been renewed for another year, which had not elapsed at the bringing of the suit, and that the $200 note had been paid or satisfied by the terms of a written agreement between the defendant and the payees made contemporaneously with the note. The case was tried in this court, and resulted in a verdict for the defendant. The plaintiff moved for a new trial for alleged misrulings. At the trial the plaintiff called as a witness Fred A. Dodge, of the firm of William E. Dodge & Son, the payees of the notes, who testified: "Shortly after the $1,106.12 note was received, and before maturity, about the time it was received, we indorsed and assigned it over to George P. Barrett, the plaintiff, for its full value, on account of our indebtedness to Barrett Bros. & Co., for which he was our guarantor." In cross-examination of this witness the court, against the plaintiff's objection, permitted a letter, written by the witness, to be read to the jury, of which the following is a copy of the material portion: "Baltimore, Md., January 3, 1888. C. G. Dodge, Jr., 214 W. 55th street, N. Y. — Dear Sir: Inclosed please find note, which please sign and return. Your note due 31st ult. was for $1,106.12-100; $63.88, twelve months' interest, — $1,172.50. We made no demand for it, as we knew you were in bad shape. * * * Wm. E. Dodge & Son." The plaintiff excepted to the ruling permitting the reading of the letter. We do not think the court erred. If the testimony of the witness in his direct examination, that the note in question had been indorsed or assigned to the plaintiff soon after it was given, nearly a year before the letter was written, was correct, it might be regarded as a somewhat unusual proceeding for him to have written the letter inclosing the new note in renewal of the old, and excusing the failure to

make a demand upon the old note when it became due. It was precisely such a letter as William E. Dodge & Son might have written had they continued to be the owners of the note. It, therefore, in view of the direct testimony of the witness, called for explanation, and, if not satisfactorily explained, would be likely to affect the judgment of the jury in relation to the credibility of the witness. We think, therefore, that it was properly admitted in cross-examination of the witness, for the purpose of affecting his credibility.

The court, in its charge to the jury, instructed them that both the notes declared on were to be considered by them as subject to the equities between the payees and the maker, according to the law of New York as set forth in the decisions of the court of that State, which had been put in evidence, and not according to the law of Maryland or of this State. To this instruction the plaintiff duly excepted. The evidence shows that the notes were drawn by Fred. A. Dodge in Baltimore, and were sent by him to the defendant in New York for his signature; that the defendant signed them in New York, and returned them to the payees by mail. No particular place of payment is specified in either note. The authorities agree that if no particular place of payment is specified in a note, or if, in other words, it is payable generally, the law of the place where it is made determines, not only its construction, but also the obligation and duty it imposes on the maker. And therefore the maker may avail himself of any equitable defenses given to him by the law of the place where the note is made. Story Prom. Notes, § 172; 2 Pars. Notes, 318, 338, 358; Stacy *v.* Baker, 1 Scam. 417; Evans *v.* Anderson, 78 Ill. 558; Young *v.* Harris, 14 B. Mon. 447; Allen *v.* Bratton, 47 Miss. 119. By the place where the note is made is not meant the place where it is written, signed, or dated, but the place where it is delivered, delivery being essential to its consummation as an obligation. So long as it remains in the possession of the maker, he is under no obligation whatever by reason of it, and it becomes binding upon him only when he has parted with its dominion and control by delivering it to the payee. Freese *v.* Brownell, 35 N. J. Law, 285; Hopper *v.* Eiland, 21 Ala. 714; Chamberlain *v.* Hopps, 8 Vt. 94; Marvin *v.* McCullum, 20 Johns. 288. The correctness of the instruction complained of depends, therefore, upon whether the notes are to be regarded as having been delivered in New York or Baltimore. We think they are to be regarded as delivered in New York. They were sent, as has been stated by the payees in Baltimore, to the maker, in New York, for his signature. In the absence of instructions to the maker as to the mode by which he should return them when signed, the payees must have contemplated that the maker would return them by the natural and ordinary mode of transmitting such obligations, and must be deemed to have authorized him to so return them. The natural and ordinary mode of transmitting them was the mail, — the mode adopted by the maker. In such cases the

post-office may be regarded as the common agent of both parties,— of the maker, for the purpose of transmitting the note; and of the payee, for the purpose of receiving it from the maker. By depositing the note in the mail, with the intent that it shall be transmitted to the payee in the usual way, the maker parts with his dominion and control over it, and the delivery is, in legal contemplation, complete. Kirkman *v.* Bank, 2 Cold. 397; Insurance Co. *v.* Grant, 4 Exch. Div. 216, also 32 Amer. Rep. note, p. 40; King *v.* Lambton, 5 Price, 428; 1 Add. Cont. 18, and cases cited in note.

The plaintiff also moves for a new trial on the ground that the verdict is against the evidence and the weight thereof. The testimony in behalf of the plaintiff, in relation to the indorsement and delivery of the notes to him as security for his guaranty of the indebtedness of the payees to Barrett Bros. & Co., it is true was not contradicted; but it also appeared from the plaintiff's own testimony that he knew the defendant was in poor circumstances when he took the notes as security, that he made no attempt to collect them when due, neither making demand on the maker nor notifying the indorsers, because he says he knew they were unable to pay them. And it further appeared that neither the books of William E. Dodge & Son, nor those of Barrett Bros. & Co., contained any entries with reference to the notes. And, as affecting the credibility of the witnesses William E. Dodge and Fred. A. Dodge, it appeared that William E. Dodge & Son had written several letters to the defendant, without the knowledge or authority of the plaintiff, although the relations between them and the plaintiff were intimate, after the notes, as it was claimed, had passed into the ownership of the plaintiff; which letters, it was argued by the defendant, were inconsistent with the plaintiff's ownership of the notes, as testified by the witnesses, and were consistent only with the theory that they were, at the time the letters were written, still the property of the payees. The jury had the right to consider all these matters as well as the contract and appearance of the witnesses in testifying, in weighing the testimony, and had the right to reject the testimony of any witness, though uncontradicted, which did not commend itself to them as reasonable or probable, in view of the whole testimony, and of their knowledge or experience of the ordinary conduct of men in similar circumstances. Moreover, it did not appear that, up to the bringing of the suit, the plaintiff had ever been called upon to pay or had paid any portion of the indebtedness of William E. Dodge & Son to Barrett Bros. & Co. under his guaranty, or that the guaranty imposed any legal liability on the plaintiff for such indebtedness. We cannot say that the verdict was not authorized by the evidence.

The plaintiff also moves for a new trial on the ground of newly-discovered evidence, the newly-discovered evidence consisting of the copy of a letter in the letter-book of Barrett Bros. & Co. written by the plaintiff to the defendant, November 29, 1887,

notifying him that the plaintiff held the $1,106.12 note, and requesting the defendant to pay it. The plaintiff, in his affidavit, says that since the trial, and since the filing of his motion for a new trial, he accidentally discovered the copy. He does not set forth that he could not, by the exercise of reasonable diligence, have ascertained the existence of the copy in season to have used it on the trial, nor any excuse for not having then produced it. The cross-examination of William E. Dodge and Fred. A. Dodge, on the taking of their depositions prior to the trial, was notice to the plaintiff that his title to the notes, as a bona fide purchaser for value before maturity, was disputed, and it was therefore incumbent on him to be prepared to sustain his claim at the trial by all the evidence in his control. We do not think he brings himself within the rule justifying the granting of a new trial on the ground of newly-discovered evidence. Petition dismissed.

Power of Officer to Bind Corporation by Note Issued in Excess of His Authority.

Merchants' Nat. Bank *v.* Citizens' Gaslight Co., 159 Mass. 505 (34 N. E. 1083).

Exceptions from superior court, Norfolk county; James R. Dunbar, judge.

Action of contract by the Merchants' National Bank of Gardiner, Me., against the Citizens' Gaslight Company of Quincy and others, on a note executed in its behalf by C. S. J. Ruggler, as its treasurer. There was a verdict in plaintiff's favor, and defendant, the Citizens' Gaslight Company, excepted to the court's refusal to rule as requested. Exceptions overruled.

BARKER, J. 1. The defendant's first request for instructions relates to the effect of St. 1886, c. 346, upon the powers of the defendant corporation to issue promissory notes. The third section of that statute relates to the issue of bonds by a gas company, and gives a company the right to secure bonds issued in accordance with the provisions of the section by a mortgage of the franchise and property of the company; but we find nothing in the chapter which affects the right of such a company to issue promissory notes when convenient or necessary in the prosecution of its business.

2. As the plaintiff discounted this note before maturity, "in the usual course of its business, without notice or knowledge of any defect or infirmity," and as its good faith is not questioned, if the note were signed by an officer authorized generally to give notes in its behalf the defendant company would be liable, although the agent in signing this particular note exceeded his authority, or the powers of the corporation. Monument Nat. Bank *v.* Globe Works, 101 Mass. 57. It is not necessary that the authority of an officer or agent to sign notes in behalf of a corporation should appear in the by-laws, or should have been expressly given by a

vote of the directors or of the stockholders. In Lester *v.* Webb, 1 Allen, 34, it was said: "The rule is well settled, that if a corporation permit their treasurer to act as their general fiscal agent, and hold him out to the public as having the general authority implied from his official name and character, and by their silence and acquiescence suffer him to draw and accept drafts, and to indorse notes payable to the corporation, they are bound by his acts done within the scope of such implied authority. Fay *v.* Noble, 12 Cush. 1; Williams *v.* Cheney, 3 Gray, 215; Conover *v.* Insurance Co., 1 N. Y. 290. On the facts proved at the trial the plaintiff might well claim, if the jury believed the evidence, that the treasurer had authority to indorse the notes in suit, derived, not from any express direction, but from the course of conduct and dealing of the treasurer with the knowledge and implied assent of the directors of the corporation." See, also, McNeil *v.* Chamber of Commerce, 145 Mass. 285; 28 N. E. Rep. 245; Mining Co. *v.* Anglo-Californian Bank, 104 U. S. 192.

3. But cases where the actual authority of an officer is inferred from a course of business known to and permitted by the stockholders or the directors of a corporation do not touch the question whether authority is to be implied as matter of law from the name and nature of the office itself. In the present case the jury were instructed that the treasurer of such a corporation as the defendant company has by virtue of his office authority to sign a note which shall bind the corporation, and the defendant contends that this instruction was incorrect. The incidental powers of some officers or agents have become so well known and defined, and have been so frequently recognized by courts of justice, that certain powers are implied as matters of law in favor of third persons who deal with them on the assumption that they possess these powers, unless such persons are informed to the contrary. The officers and agents usually mentioned in this category are auctioneers, brokers, factors, cashiers of banks, and masters of ships. See Merchants' Bank *v.* State Bank, 10 Wall. 604; Case *v.* Bank, 100 U. S. 446. Treasurers of towns or cities in this commonwealth are well-known officers, and their powers are very limited. They are in general to receive, keep, and pay out money on the warrant of the proper officers of the towns and cities. Treasurers of business corporations usually have much more extensive powers, and the decisions of this court hold that the treasurer of a manufacturing and trading corporation is clothed by virtue of his office with power to act for the corporation in making, accepting, indorsing, issuing, and negotiating promissory notes and bills of exchange, and that such negotiable paper in the hands of an innocent holder for value, who has taken it without notice of any want of authority on the part of the treasurer, is binding on the corporation, although with reference to the corporation it is accommodation paper. Narragansett Bank *v.* Atlantic Silk Co., 3 Metc. (Mass.) 382; Bates *v.* Iron Co., 7 Metc. (Mass.) 224; Fay *v.* Noble, 12 Cush.

1; Lester *v.* Webb, 1 Allen, 34; Bank *v.* Winchester, 8 Allen, 109; Bird *v.* Daggett, 97 Mass. 494; Monument Nat. Bank *v.* Globe Works, ubi supra; Corcoran *v.* Cattle Co., 151 Mass. 74; 23 N. E. Rep. 727. While it is possible that most, if not all, of the cases in which this rule has been stated as law have some special circumstances from which the treasurer's authority could be inferred, and that the court was influenced in the decisions by the well known fact that in many of the manufacturing corporations of this commonwealth the treasurer not only has the custody of the money, but is the general financial manager, and often the general business manager, of the corporation, the rule itself has been frequently and broadly stated in our decisions, and is well known both to the officers of manufacturing and trading corporations and to those of banks and financial institutions. It could not now be abrogated or unsettled without disturbing commercial transactions. There are, however, many corporations which transact more or less business to which the rule has been held not to apply. Thus it does not apply to a college (Webster *v.* College, 23 Pick. 302), nor to a parish (Packard *v.* Society, 10 Metc. [Mass.] 427), nor to a monument association (Torrey *v.* Association, 5 Allen, 327), nor to a municipality (Bank *v.* Winchester, 8 Allen, 109), nor to a savings bank (Tappan *v.* Bank, 127 Mass. 107), nor to a horse-railroad company (Craft *v.* Railroad Co., 150 Mass. 207; 22 N. E. Rep. 920). Upon consideration of the decisions cited, we think it fair to say that the making and indorsing of negotiable paper is to be presumed to be within the power of the treasurer of a manufacturing and trading corporation whenever from the nature of its ordinary business as usually conducted the corporation is naturally to be expected to use its credit in carrying on commercial transactions. Such paper is the usual and ordinary instrument of utilizing credit in commercial transactions, and it is for the interest of the corporation and of the community that the best instrument should be employed. It is no less for the interest of all that, if negotiable paper is to be employed, its validity should not be open to objections which would impair its usefulness by requiring at every step an inquiry into the authority by which it is issued. There are matters of common knowledge pertinent to the present question. Gaslight companies like the defendant are chartered for the purpose of making and selling gas. They are located in every city of the commonwealth, and in most of the larger towns and villages. In the recent development of the use of electricity many electric light or light and power companies have been established where gaslight companies are in operation. The powers, obligations, and business of these electric companies are so similar to those of gaslight companies that they are classed with them in the minds of business men, and are under the supervision of the same State board. We see no reason why, in respect to the present question, all of this general class or corporations should not be governed by one rule. They are all in fact "manufacturing and trading corpora-

tions" in the same sense that companies whose business it is to manufacture and sell cottons, woolens, shoes, or paper are manufacturing and trading corporations. None of these companies are traders in the strict sense contended for by the defendant, since none of them make it their "business to buy merchandise or goods and sell the same." All of them, and the gaslight companies equally with the others named, buy merchandise and goods in large amounts, expend large sums in transforming by their processes of manufacture the articles purchased into other commodities which they sell for the purpose of making a profit. Neither the fact that pipes which a gaslight company uses only to deliver to its customers one of the commodities which it sells, nor that its price for that commodity may be regulated by civil authority, nor that the municipality in which its plant is located may purchase or take its franchise and property, makes it less advantageous or necessary, that the gaslight company shall be able to use its credit in its commercial dealings. Although such companies manufacture only as they deliver, and so have no occasion to hold large quantities of manufactured goods for a market, there are features of their business which make it necessary for them to have control of large amounts of money at certain seasons. Coal, their chief raw material, is uniformly at its lowest price in the summer, and away from the seaboard is usually taken in in large quantities at that season. Gas is uniformly sold upon time, and the bills collected monthly or quarterly. The work of extending and repairing street mains and other work upon the manufacturing plant can be done to the best advantage during only a portion of the year. A business so conducted affords abundant scope for the advantageous use of the credit of the corporations engaged in it, and they would naturally be expected to use their credit in the transaction of their ordinary business. Their published returns made to the board of gas commissioners show that the companies do in fact issue large amounts of promissory notes. It is true that these notes may possibly have been issued under special votes or by-laws or other explicit authority. Upon this point we have no evidence or means of certain knowledge. But it is also true, and is a consideration entitled to weight, that the practice of gaslight companies to issue promissory notes has grown up since the announcement by the court of the rule that treasurers of manufacturing and trading corporations are presumed to have authority to issue such notes; and again, that gaslight companies are in fact manufacturing and trading corporations. The strong inference is that the gaslight companies and their officers, and those who have received in payment or bought or discounted their promissory notes, have in so doing acted upon the assumption that the rule as to the implied authority of treasurers of manufacturing and trading corporations to issue negotiable paper applied to the treasurers of gaslight companies. Those who have occasion to deal directly with such companies, or to purchase or

discount their notes in the money market, would naturally assume that the rule so long applied by the court to other manufacturing and trading corporations would be applied to these. In our opinion, the same reasons which required the making of the rule referred to are operative here, and require us to hold that it is to be applied in the case of gaslight companies. We do not disregard the fact that such companies have peculiar duties to the public, and peculiar privileges, and that their operations may be regulated by public authority, and their franchises and property taken over by the municipalities in which their works are located. But the situation of such a company with reference to this class of rights and obligations is the same irrespective of the question whether its treasurer is or is not to be presumed to have power by virtue of his office to issue promissory notes. Such notes do not bind the franchises or the property of the company any more than debts upon open account. A majority of the court is therefore of opinion that the jury was rightly instructed that the treasurer of the defendant corporation by virtue of his office, had authority to sign a note which would bind the corporation.

4. It is not necessary to consider in detail the numerous questions argued by the defendant as to the admission and the exclusion of evidence and the rulings given and refused, bearing upon the status of Mr. Ruggles as the treasurer de jure or de facto of the corporation, or upon the answers to the special questions propounded by the court and answered by the jury in addition to the general verdict for the plaintiff. Upon the uncontroverted evidence, certain persons claiming to act as the stockholders of the corporation, all of whom were interested in its stock, assembled at its office on the day fixed in its by-laws as the date of its annual stockholders' meeting, and went through the forms of holding its annual meeting and of electing him treasurer of the company. The former incumbent of the office resigned it into the hands of Mr. Ruggles, and he has since filled the position of treasurer under a claim of a right to the office, and without dispute on the part of any stockholder or member of the corporation, and no proceedings have been brought by the corporation itself to test his title to the office. The note in suit was issued when he had thus been in the unquestioned discharge of the functions of the office for nearly three months, and immediately thereafter, at a meeting of which public notice was given, his election was ratified and confirmed. No person in any way interested in the stock, either as a stockholder of record or as a purchaser or pledgee of untransferred certificates, has contested in any way his right to the office. The contention that he is not the lawfully elected treasurer has been made only by the corporation itself, and only as a technical defense to the present suit. Whatever might be the rule to be applied if a stockholder or member of the corporation or the corporation itself had contested the right of Mr. Ruggles in proceedings brought to test the validity of his original election, or of the subsequent ratification,

and without holding as to the rules which apply to de facto officers of government or of public or quasi-public corporations, we are of opinion that under such circumstances the corporation itself cannot be permitted to contend in defense of an action like the present that the acts of a person who, under color of an election to the office, has, without protest or opposition from any source, acted as its treasurer for so long a time, are invalid merely because the annual meeting at which he was chosen was not called in accordance with the by-laws. None of the exceptions relating to this branch of the case are, in view of the uncontroverted facts, material to the question whether the note in suit is a valid cause of action against the corporation, and they are overruled as immaterial. Exceptions overruled.

Field, C. J. (dissenting). The most important question in this case is whether the instruction of the court is correct that the treasurer of such a corporation as the defendant has authority to sign a promissory note for the corporation by virtue of his office, although the by-laws confer no such authority on him, and he has not been held out by either the stockholders or the directors of the corporation as having any such authority, and has not been knowingly permitted to exercise any such power. The ground on which certain officers and agents are held, as matter of law, to possess certain implied powers by virtue of the office or employment, is that by a well-known general usage certain powers attach to the office or employment, and the appointment is presumed to have been made with reference to this usage, unless there is notice or knowledge to the contrary. The grounds on which this court has decided that the treasurer of a manufacturing and trading corporation must be taken to have authority to sign promissory notes in behalf of the corporation, unless there is notice or knowledge to the contrary, are stated in the opinion of the majority of the court, but these decisions have been confined to corporations which sell merchandise in the market, although they manufacture the merchandise which they sell, and the doctrine has never been extended to such quasi-public corporations as gaslight companies. In a street-railway corporation, which perhaps affords the nearest analogy, an implied power in the treasurer to sign promissory notes for the corporation has been denied, and treasurers of municipal corporations, and of corporations generally, have no such implied power. Gaslight companies are not commonly known as "trading companies." They do not sell goods, wares, and merchandise in the market. Indeed, they are not commonly called "manufacturing companies." They manufacture and deliver gas to the inhabitants of defined localities, at prices fixed either by public authority or by the companies themselves, subject to public supervision. They may be invested with the right of eminent domain, and subjected to municipal control, and the business may be carried on by towns and cities as well as by private corporations. Their property is mainly in real estate. The income is received at regular times,

and, although small in proportion to the value of the plant, is not subject to unforeseen variations in kind or amount. These companies may issue bonds at not less than par, but, unless specially authorized by the legislature, the amount of bonds must not exceed the capital actually paid in (St. 1886, c. 356, § 3), and the property which constitutes the plant is or should be paid for by the capital stock and the proceeds of the bonds. Such companies may sometimes have occasion to borrow money and to give promissory notes, but, if well conducted, the occasions cannot be frequent. The word "treasurer," in and of itself, does not import that the person holding that office is the general business manager of the corporation, but only that he is the person to receive, keep, and disburse the money of the corporation. It was not shown in the present case that treasurers of similar corporations customarily exercise the power of giving promissory notes in behalf of the corporations. Such a power may be given by the by-laws to a treasurer, either alone or jointly with some other officer or officers; but in this case the defendant offered to show that by the by-laws the treasurer "had no power as treasurer to sign notes in behalf of the company," and this evidense was excluded. We know of no custom or usage of which we can judicially take notice that treasurers of such corporations usually have such authority, or usually exercise such a power. We know of no principle of public policy which requires us to hold that the treasurer of such a corporation has impliedly such a power, when he in fact has it not, and has not been held out by the corporation or its directors as having it, and when it does not appear that treasurers of similar corporations have customarily exercised such a power so publicly and uniformly that courts can take judicial notice of it. It is important that corporations should retain the power of controlling their officers. The general rule is that when one person signs the name of another to any contract, whether the other be a natural or artificial person, the authority to do so should be shown, unless the principal has held out such person as having such authority. The instances must be rare when the law will necessarily imply from the name of an office in a corporation authority to sign the name of the corporation to any contract when no such authority has in fact been given, or has ever before been exercised with the knowledge of the stockholders or directors of the corporation. There is, generally speaking, no hardship in compelling persons who take promissory notes signed by one person in the name of another to ascertain the authority of the person signing, unless they are content to rely upon an indorser or guarantor. I think the instruction given on this subject was wrong.

Allen, J., concurs in this opinion.

Form of Signature by Agent to Bind Corporation — Note Must Run in Name of Corporation.

Casco Nat. Bank *v.* Clark, 139 N. Y. 307 (34 N. E. 908).

Appeal from supreme court, general term, second department.

Action by the Casco National Bank of Portland against John Clark and E. H. Close. From a judgment of the general term (18 N. Y. Supp. 887) affirming a judgment in favor of plaintiff, defendants appeal. Affirmed.

Gray, J. The action is upon a promissory note, in the following form, viz.:—

Ridgewood Ice Co.

Brooklyn, N. Y., Aug. 2, 1890.

$7,500. Three months after date we promise to pay to the order of Clark & Chaplin Ice Company seventy-five hundred dollars at Mechanics' Bank; value received.

John Clark, Prest.

E. H. Close, Treas.

It was delivered in payment for ice sold by the payee company to the Ridgewood Ice Company under a contract between those companies, and was discounted by the plaintiff for the payee before its maturity. The appellants Clark and Close appearing as makers upon the note, the one describing himself as "Prest." and the other as "Treas." were made individually defendants. They defended on the ground that they had made the note as officers of the Ridgewood Ice Company, and did not become personally liable thereby for the debt represented. Where a negotiable promissory note has been given for the payment of a debt contracted by a corporation, and the language of the promise does not disclose the corporate obligation, and the signatures to the paper are in the names of individuals, a holder taking bona fide and without notice of the circumstances of its making is entitled to hold the note as the personal undertaking of its signers, notwithstanding they affix to their names the title of an office. Such an affix will be regarded as descriptive of the persons, and not of the character of the liability. Unless the promise purports to be by the corporation, it is that of the persons who subscribe to it; and the fact of adding to their names an abbreviation of some official title has no legal signification as qualifying their obligation, and imposes no obligation upon the corporation whose officers they may be. This must be regarded as the long and well-settled rule. Byles Bills, §§ 36, 37, 71; Pentz *v.* Stanton, 10 Wend. 271; Taft *v.* Brewster, 9 Johns 334; Hills *v.* Bannister, 8 Cow. 31; Moss *v.* Livingston, 4 N. Y. 208; De Witt *v.* Walton, 9 N. Y. 571; Bottomley *v.* Fisher, 1 Hurl. & C. 211. It is founded in the general principle that in a contract every material thing must be definitely expressed, and not left to conjecture. Unless the language creates, or fairly implies, the undertaking of the corporation, if the purpose is equivocal, the obligation is that of its apparent makers.

It was said in Briggs *v.* Partridge, 64 N. Y. 357, 363, that persons taking negotiable instruments are presumed to take them on the credit of the parties whose names appear upon them, and a person not a party cannot be charged upon proof that the ostensible party signed or indorsed as his agent. It may be perfectly true, if there is proof that the holder of negotiable paper was aware, when he received it, of the facts and circumstances connected with its making, and knew that it was intended and delivered as a corporate obligation only, that the persons signing it in this manner could not be held individually liable. Such knowledge might be imputable from the language of the paper, in connection with other circumstances, as in the case of Mott *v.* Hicks, 1 Cow. 513, where the note read, "the president and directors promise to pay," and was subscribed by the defendant as "president." The court held that that was sufficient to distinguish the case from Taft *v.* Brewster, supra, and made it evident that no personal engagement was entered into or intended. Much stress was placed in that case upon the proof that the plaintiff was intimately acquainted with the transaction out of which arose the giving of the corporate obligation. In the case of Bank of Genesee *v.* Patchin Bank, 19 N. Y. 312, referred to by the appellants' counsel, the action was against the defendant to hold it as the indorser of a bill of exchange drawn to the order of "S. B. Stokes, Cas.," and indorsed in the same words. The plaintiff bank was advised, at the time of discounting the bill by the president of the Patchin Bank, that Stokes was its cashier, and that he had been directed to send it in for discount, and Stokes forwarded it in an official way to the plaintiff. It was held that the Patchin Bank was liable, because the agency of the cashier in the matter was communicated to the knowledge of the plaintiff, as well as apparent. Incidentally it was said that the same strictness is not required in the execution of commercial paper as between banks; that is, in other respects, between individuals.

In the absence of competent evidence showing or charging knowledge in the holder of negotiable paper as to the character of the obligation, the established and safe rule must be regarded to be that it is the agreement of its ostensible maker, and not of some other party, neither disclosed by the language nor in the manner of execution. In this case the language is "we promise to pay," and the signatures by the defendants Clark and Close are perfectly consistent with an assumption by them of the company's debt. The appearance upon the margin of the paper of the printed name "Ridgewood Ice Company" was not a fact carrying any presumption that the note was, or was intended to be, one by that company. It was competent for its officers to obligate themselves personally, for any reason satisfactory to themselves; and, apparently to the world, they did so by the language of the note, which the mere use of a blank form of note having upon its margin the name of their company was insufficient to negative.

In order to obviate the effect of the rule we have discussed, the appellants proved that Winslow, a director of the payee company, was also a director in the plaintiff bank at the time when the note was discounted, and it was argued that the knowledge chargeable to him, as director of the former company, was imputable to the plaintiff. But that fact is insufficient to charge the plaintiff with knowledge of the character of the obligation. He in no sense represented or acted for the bank in the transaction, and, whatever his knowledge respecting the note, it will not be imputable to the bank. Bank *v.* Norton, 1 Hill, 572, 578; Mayor, etc. *v.* Tenth Nat. Bank, 111 N. Y. 446, 457; 18 N. E. Rep. 618; Bank *v.* Payne, 25 Conn. 444. He was but one of the plaintiff's directors, who could only act as a board. Bank *v.* Norton, supra. If he knew the fact that these were not individual, but corporate, notes, we cannot presume that he communicated that knowledge to the board. An officer's knowledge, derived as an individual, and not while acting officially for the bank, cannot operate to the prejudice of the latter. Bank *v.* Davis, 2 Hill, 451. The knowledge with which the bank as his principal would be deemed chargeable, so as to affect it, would be where, as one of the board of directors, and participating in the discount of the paper, he had acted affirmatively or fraudulently with respect to it, as in the case of Bank *v.* Davis, supra, by a fraudulent perversion of the bills from the object for which drawn, or as in Holden *v.* Bank, 72 N. Y. 286, where the president of the bank, who represented it in all the transactions, was engaged in a fraudulent scheme of conversion. It was said in the latter case that the knowledge of the president as an individual or as an executor was not imputable to the bank merely because he was the president, but because, when it acted through him as president, in any transaction where that knowledge was material and applicable, it acted through an agent. The rule may be stated, generally, to be that where a director or an officer has knowledge of material facts respecting a proposed transaction, which his relations to it, as representing the bank, have given him, then, as it becomes his official duty to communicate that knowledge to the bank, he will be presumed to have done so, and his knowledge will then be imputed to the bank But no such duty can be deemed to have existed in this case, where the appellants have made and delivered a promissory note, purporting to be their individual promise. If one of the plaintiff's officers did have knowledge — whether individually or as a director of the Clark & Chaplin Company is not material — that the paper was made and intended as a corporate note, his failure to so state to the bank could not prejudice it. It was in no sense incumbent upon him, assuming that he actually participated in the discount (a fact not shown), to explain that the note was the obligation of the Ridgewood Company, and not of the persons who appeared as its makers. He was under no duty to these persons to explain their acts, and the law would not imply any. At most it would be merely a case of knowledge,

acquired by a director of facts not material to the transaction of discount by the plaintiff, and which he was under no obligation to communicate. No other questions require discussion, and the judgment rendered below should be affirmed, with costs. All concur.

Ambiguous Execution of Corporate Note by Agent.

Frankland *v.* Johnson, 147 Ill. 520 (35 N. E. 480).

Appeal from appellate court, first district.

Assumpsit by L. M. Johnson against Benjamin Frankland. Plaintiff obtained judgment, which was affirmed by the appellate court. Defendant appeals. Affirmed.

WILKIN, J. This was an action in assumpsit by appellee versus appellant, commenced in the superior court of Cook county by attachment. The declaration consisted of the common counts, and a special count upon the following instrument: "$5,592.00. Chicago, June 1st, 1885. On or before the first day of June, 1888, the Western Seaman's Friend Society agrees to pay to L. M. Johnson or order the sum of five thousand five hundred and ninety-two dollars, with interest at the rate of six per cent per annum. B. Frankland, Gen. Supt." The special count alleges that the defendant, on, etc., "made his certain promissory note in writing, * * * in and by which said note the said defendant, by the name, style, and description of the 'Western Seaman's Friend Society,' promised to pay the said defendant," etc. "* * * And that he, the said defendant, at the same time and place of the execution of the note aforesaid, and as part of the same transaction, by a certain writing upon the face of said note, guarantied the prompt payment of the same, and undertook and promised to pay to the order of said plaintiff the sum of money therein mentioned, * * * which writing was in the words and figures, to wit, 'B. Frankland, Gen. Supt.'" The affidavit for attachment alleged that the defendant was a non resident of the State, and that upon diligent inquiry his place of residence could not be ascertained. An amended affidavit set up other causes for attachment, but, in our view of the case, it is unimportant. To the declaration, the defendant filed a plea of nonassumpsit; and to the writ of attachment, a plea in abatement, traversing the allegations of the affidavit. On these pleas, issue was joined, and a trial partially had before a jury; but, before it was concluded, it was agreed between the parties that the jury might be discharged, and the case be submitted to the court, which was done. Judgment was rendered for the plaintiff for the amount of the note sued on, and sustaining the attachment. The defendant appealed to the appellate court, and it affirmed the judgment of the superior court.

As to the cause of action, the question between the parties is whether the instrument sued on is the personal note of the defend-

ant. or that of the Western Seaman's Friend Society. It is contended by counsel for appellee that, there being no plea, verified by affidavit, denying the execution of the instrument, the defendant cannot question his individual liability upon it. This position is based upon section 34, c. 110, of our statute, which provides that no person shall be permitted to deny on trial the execution of any instrument in writing upon which any action may have been brought, unless the person so denying the same shall, if defendant, verify his plea by affidavit. The defendant did not claim the right on the trial to deny the execution of the note. He admits that fact, but denies that, as executed, it became his personal obligation. This we think he might do without a sworn plea, and that seems to have been the view of the trial court. The defendant was permitted to introduce his own, and the testimony of other witnesses, giving his version of all the facts and circumstances under which the note was made, and therefore had the benefit of all the facts available to him as a defense under any state of pleading. The writing, on its face, is not distinctly the note of Frankland. A personal note by him, in proper form, would have used the personal pronoun "I," instead of the name of the corporation, and would have been signed without the designation "Gen. Supt." Neither is it, by its terms, a note of a corporation. As such, it should have been signed with the name of the corporation, by its president, secretary, or other officers authorized to execute it; or, as in Scanlan *v.* Keith, 102 Ill. 634, by the proper officers, designating themselves officers of the corporation for which they assumed to act; or, as in Bank *v.* Gillet, 100 Ill. 254, using the corporate name both in the body of the note and in the signatures to it.

But if it be conceded that, prima facie, a general superintendent of a corporation has authority to make promissory notes in its name, and this instrument held to appear on its face to be the obligation of the society, rather than of Frankland, certainly it could not even then be contended that it was conclusively so. It is well understood that, if the agent, either of a corporation or as an individual, makes a contract which he has no authority to make, he binds himself personally according to the terms of the contract. Ang. & A. Corp., § 303. It was said by Sutherland, J., in Mott *v.* Hicks, 1 Cow. 513: "It is perfectly well settled that if a person undertake to contract as agent for an individual or corporation, and contracts in a manner which is not legally binding upon his principal, he is personally responsible [citing authorities]. And the agent, when sued upon such a contract, can exonerate himself from personal liability only by showing his authority to bind those for whom he has undertaken to act. It is not for the plaintiff to show that he has not authority. The defendant must show affirmatively that he had." This rule is quoted with approval in Wheeler *v.* Reed, 36 Ill. 91. This action is against Frankland individually. The note is declared upon as his personal promise to pay. The question, then, as to whether

it is his contract, or that of the Western Seaman's Friend Society, is one of fact, and so it was treated on the trial. Both parties went fully into the facts and circumstances leading to and attending the making of the note. So far from showing affirmatively that appellant had authority to make the note, so as to bind the corporation, the evidence surely tends to show the contrary, and that it was the intention of the parties that he should be individually responsible. No record proceedings whatever on the part of the corporation, pertaining to appellant's transactions with appellee or her husband, were shown. It is clear that, if suit had been against the society, there could have been no recovery. on the evidence in this record. At all events, the facts have been settled adversely to appellant, and are not open to review in this court.

The propositions submitted to the trial court by appellant, to be held as law applicable to the case, are mainly requests to hold certain facts to have been proven, and under the evidence they were all properly refused. In fact, no argument is made in support of them. There is but one theory on which the judgment below could be reversed by this court, and that is that the note sued on must be held to be the contract of the corporation, absolutely and conclusively, and all parol proof tending to establish appellant's liability was incompetent, and that theory is clearly untenable.

As to the judgment on the attachment, it is only necessary to say that the evidence at least tended to support the allegations of the original affidavit, and the judgment of affirmance in the appellate court is conclusive. The judgment of the appellate court will be affirmed.

When Parol Evidence is Admissible to Charge Corporation on Note.

Sparks *v.* Despatch Transfer Co., 104 Mo. 531 (15 S. W. 417).

Appeal from circuit court, Jackson county; J. H. Slover, Judge.

This is an action on five negotiable promissory notes, alleged to have been executed by defendant by and through one Stewart Jackson. The plaintiffs were copartners engaged in the horse and mule business in Kansas City, and had been for two years prior to the making of the notes sued on. The defendant was a business corporation, organized under the laws of this State, and doing transfer business in Kansas City. On the 21st day of June, 1887, one Stewart Jackson, in payment for certain mules by him bought of plaintiffs that day, gave plaintiffs the following note: "$1,860.00. Kansas City, Mo., June 21, 1887. Sixty days after date I promise to pay to the order of Sparks Bros. and Hancock, eighteen hundred and sixty dollars, for value received, at the banking office of H. S. Mills, in Kansas

City, Mo., with interest from date at the rate of ten per cent per annum until paid, and, if interest be not paid annually, to become as principal, and bear the same rate of interest. Due Aug. 20, 1887. Despatch Transfer Co., by S. Jackson, president." And on July 5, 1887, said Jackson, in payment of mules that day bought of plaintiffs, gave plaintiffs the following note: "$1,840.00. Kansas City, Mo., July 5, 1887. Thirty days after date we promise to pay to the order of Sparks Bros. and Hancock, eighteen hundred and forty dollars, for value received, at the banking office of H. S. Mills & Son, in Kansas City, Mo., with interest from date at the rate of ten per cent per annum until paid, and, if interest be not paid annually, to become as principal, and bear the same rate of interest. Due Aug. 5, 1887. Despatch Transfer Co., by S. Jackson, President. Indorsed: Protest waived. S. Jackson." On the 11th of June, 1887, said Jackson, for mules bought by him of plaintiffs, gave them this note: "$300.00. Kansas City, Mo., June 11, 1887. Sixty days after date I promise to pay to the order of Sparks Bros. and Hancock, three hundred dollars, with ten per cent interest from date, value received. Due Aug. 10, 1887. S. Jackson." On June 11th said Jackson, for mules by him bought that day of plaintiffs, gave this note: "$375.00. Kansas City, Mo., June 11, 1887. Sixty days after date I promise to pay to the order of Sparks Bros. and Hancock, three hundred and seventy-five dollars, with ten per cent interest from date, value received. S. Jackson." And on June 15th this note: "$240. Kansas City, Mo., June 15, 1887. Sixty days after date I promise to pay to the order of Sparks Bros. and Hancock, two hundred and forty dollars, for one mouse-colored mule, bought of C. Sparks, with ten per cent interest from date, value received. Due Aug. 14, 1887. S. Jackson." The plaintiffs declare upon each note separately, and charge that the defendant executed all five of the notes, by its president, Stewart Jackson. There is also a sixth count, which is as follows: "(6) Plaintiffs, for another cause of action, state that between the 10th day of June, 1887, and the 16th day of June, 1887, plaintiffs, at the request of the defendant, sold and delivered to the defendant certain mules as follows, to wit: On the 11th day of June three (3) mules, for $675 00; on the 15th day of June, 1887, one (1) mule for $240.00; amounting in all to the sum of $915.00; which said sum defendant owes plaintiffs, and fails and refuses to pay the same, although payment has been demanded; wherefore plaintiffs demand payment against defendant for the sum of $915.00 and for costs."

The defendant, for its defense, denies that it executed either of said notes; denies that it ever authorized the execution of either of said notes; alleges that said notes were given to plaintiffs by said Jackson on his own private account, and that the consideration therefor was certain mules and horses sold by plaintiff to Jackson for his individual account, and in no way connected with defendant's business; that said mules and horses

were never delivered to defendant, and were never bought by or for defendant; that Jackson was carrying on a general business, buying and selling horses and mules for his own account, which plaintiffs well knew; and that the horses and mules for which these notes were given were bought by said Jackson in the ordinary course of his business, and plaintiffs knew he did not buy said mules and horses for defendant. Defendant set up its charter, showing that by it it was only authorized to conduct a general transfer business in the city of Kansas, moving freight from point to point in said city; that it was never engaged in the business of buying or selling horses or mules, nor authorized any one to do so for it; that said two notes were wrongfully executed in its name by Jackson; that it had no power to engage in the horse and mule business, and the notes and the trades for said mules were *ultra vires*. Also pleaded especially that by one of its by-laws it was provided: "No debt for a sum larger than five hundred dollars shall be contracted in behalf of the company by any officer thereof, without a vote of the board of directors authorizing same." That the debt sued for in the first and second and sixth counts exceeded five hundred dollars. That said mules were not bought for defendant by said Jackson in the usual routine of business: that they were not needed by defendant for its business; that they were not desired; that defendant knew nothing of their purchase, and its board of directors never authorized their purchase, nor the contracting of the debt therefor. This answer was verified by Harry E. Overstreet, secretary and treasurer. The reply was a general denial. The cause was tried by a jury, and resulted in favor of plaintiffs on each count except the sixth.

The facts developed by the evidence are as follows: The defendant was a corporation engaged in the transfer business in Kansas City. Stewart Jackson was the president of the company. The company, as originally organized, had a capital of $10,000,—100 shares. Jackson had the controlling interest,—55 shares. Afterwards the stock was increased to $30,000, of which Jackson had 160 shares,—a majority of all the stock. Jackson was the president from the beginning until he left, in August, 1887, after the execution of the notes sued on. It also appears that Jackson purchased every mule and horse that defendant ever owned until he absconded; that defendant's business required mules to haul the freight it handled; that, beginning with November, 1885, and ending May 13, 1887, defendants had some 13 different transactions in mules with plaintiffs or the firm which plaintiffs succeeded, aggregating some $3,000; that in a number of these transactions the defendant gave its note in its name, by Jackson, who conducted all the trades. There was also evidence that the mules were all turned over to defendant's barns. Defendant offered evidence that it did not get the mules; that, although brought to its barns, they were taken out by Jackson, and shipped to St. Louis; that Jackson bought the mules on his own account, and

that plaintiffs knew it. Plaintiffs offered evidence that they thought and were informed that the mules were bought by Jackson for the defendant; that when Jackson gave the three notes sued on in counts 3, 4, and 5, they directed him to give the company's notes to the clerk of plaintiffs in their counting-room, and did not know, till after Jackson had absconded, the notes simply bore his name; that they were selling the stock to defendant. On the trial defendant objected to the introduction of the three notes sued on in the third, fourth, and fifth counts, for the reason that they were incompetent, irrelevant, and immaterial, as they were the individual notes of S. Jackson alone; that defendant was not and could not be bound thereby. The court gave nine instructions for the plaintiff, in which the liability of defendant for the acts of Stewart Jackson, done in its name, was correctly defined. The eighth instruction is as follows: "(8) As to those notes here sued on, executed in the name of S. Jackson, the jury will ascertain whether these were executed for and in behalf of the company; and if you find that they were so executed, then as to those the defendant is liable thereon to the same extent as if said notes had been executed in the name of the company." For the defendant the court gave 22 instructions, fully submitting all the issues tendered in its answer, that the mules were purchased by Jackson on his individual account, that plaintiffs knew it, and whether the purchasers were *ultra vires*. The court refused the twenty-third instruction, which is as follows: "(23) The jury are further instructed that, even if they should believe from the evidence that at the time of the execution of the notes in controversy, and signed in the name of the defendant company, plaintiffs in good faith believed that they were dealing with defendant's company, and yet, while the mules, which in return for said notes were delivered to S. Jackson, remained in his possession, and plaintiffs knew of their whereabouts before disposed of by said Jackson, plaintiffs or their authorized representatives became aware or had reason to know that said Jackson deceived them, and misrepresented to them that said mules were for defendant company, and, notwithstanding such knowledge, made no effort to recover their said mules, but suffered said Jackson to proceed and dispose of the same, then they cannot recover from defendant company; and in determining these questions the jury should determine from the evidence whether said mules were shipped by said S. Jackson to St. Louis, and whether Charlie Sparks was the authorized representative of plaintiffs, and whether he was present at the time of said shipment, or knew of the same in time to have notified plaintiffs and effected a recovery of the mules before they were finally disposed of by said Jackson, if you believe he did dispose of them." The jury returned the following verdict: "We, the jury, find for the plaintiffs on the first five counts of the petition as follows: First count, principal and interest, $1,937.50; second count, principal and interest, $1,909.49; third count, principal and interest, $313.33⅓; fourth

count, principal and interest, $391.66⅔; fifth count, principal and interest, $250.40. We also find for defendant on the sixth count of the petition. John J. Granefield, Foreman."

GANTT, J. (*after stating the facts as above*). The notes sued on in this case were all executed by Stewart Jackson, who was at the time of their execution the president of the defendant below, appellant here. The first two were signed in the name of the Despatch Transfer Company, by Jackson as president; the other three by Jackson, without any reference to the corporation, or any words indicating that he intended to bind any one but himself. The appellant seeks to avoid liability for any of these notes, but its defense differs, as to the first two, from its defense to the remaining three. Counsel for appellant argues that the evidence did not justify the instructions given for respondents, by which appellant was held liable on the two notes signed with the corporate name. Those instructions, in substance, declared the law to be that, if the jury should find that Jackson was the president of the defendant, and that defendant allowed him to act as their purchasing agent in buying stock in the name of the company, and recognized his act as such by paying his orders given on the company, or by paying his notes given by him for stock so purchased by him of plaintiffs, then defendant was bound by his acts in purchasing the mules of plaintiff, and for the notes sued on in the first two counts, unless plaintiffs knew or had reasonable means of knowing that Jackson was buying these mules on his individual account. The power of Jackson to bind the defendant is governed by the law of agency. The principle underlying is the same whether the principal be a corporation or an individual. It is now well settled that when in the usual course of the business of a corporation an officer has been allowed to manage its affairs, his authority to represent the corporation may be implied from the manner in which he has been permitted by the directors to transact its business. This is only the application of the principle that usual employment is evidence of the powers of an agent, and the principal is held responsible for the acts of his agent within the apparent authority conferred on the agent. First Nat. Bank *v.* North Missouri &c. Co., 86 Mo. 125; Washington Mut. Fire Ins. Co. *v.* St. Mary's Seminary, 52 Mo. 480; Kiley *v.* Frosee, 57 Mo. 390; Martin *v.* Webb, 110 U. S. 7; 3 Sup. Ct. Rep. 428; Mining Co. *v.* Anglo-Californian Bank, 104 U. S. 192. The president of a business corporation is its chief executive officer. He may, without any special authority from the board of directors, perform all acts of an ordinary nature, which by usage or necessity are incident to his office, and may bind the corporation by contracts in matters arising in the usual course of business. Boone Corp., § 144; Stokes *v.* Pottery Co., 46 N. J. Law, 237. In the case at bar Stewart Jackson was president of defendant. He purchased every mule that defendant owned from its organization until after the execution of the notes sued on in this case. He had repeatedly signed notes in the name of the corporation,

and the corporation had honored his orders and paid his notes so drawn. Plaintiffs had 13 different transactions with him as the president and purchasing agent of defendant prior to the giving of the notes herein, and his acts had always been ratified. The defendant was engaged in a transfer business in which the motive power was mules, and it was its written charter privileged to buy mules, and execute its notes therefor. Jackson had purchased mules for defendant of the plaintiffs; and on this occasion he informed them that he was purchasing the mules for which these two notes were given, for the defendant. His transaction, under the evidence, was within both his actual and apparent authority to bind the defendant. The evidence is amply sufficient to bind defendant on these two notes; and there was no error in the instructions given for plaintiffs on these two notes, and certainly defendant ought not to be heard to complain.

The action of the court in admitting parol evidence to show that the defendant was liable on the three notes sued on in third, fourth, and fifth counts, notwithstanding its name nowhere appeared on the notes, and in instructing the jury as it did in the eighth instruction for the plaintiffs, presents for our consideration a question of great practical importance, and much depends upon its right decision. The exact question here presented has not been passed on by this court in any case that we have been able to find, but it has been long settled in many of our sister States. In Massachusetts as early as 1814, in the case of Stackpole *v.* Arnold, 11 Mass. 27, it was held that, "where one makes a written contract, intending to act therein as the agent of another, and to bind his principal, it is necessary that it should appear in the contract itself that he acts as such agent;" and oral testimony was held inadmissible to contradict, vary, or materially affect the written contract. The same question came before the same court again in 1863, in Brown *v.* Parker, 7 Allen, 337. In that case one N. H. Streeter had signed two negotiable notes, and it was sought to hold defendant Parker, on the ground that Streeter was his agent, and intended to bind defendant. The court says: "But in suits on promissory notes or bills of exchange no evidence is admissible to charge any person as principal whose name is not in some way disclosed on the face of the note or draft. This point has been often decided in this commonwealth, and the reasons on which the rule rests have been fully stated in very recent decisions;" citing Slawson *v.* Looring, 5 Allen, 340, and cases cited, it which it was said by Chief Justice Bigelow: "Being negotiable paper, all evidence *dehors* the drafts is to be excluded. It is wholly immaterial, therefore, that the defendant was in fact the agent of the company named on the face of the drafts; that the plaintiff knew that he was so, and that the defendant had no personal interest in the company." In New York, in Pentz *v.* Stanton, 10 Wend. 271, the cases both in England and in the different States of the Union were reviewed, and the conclusion reached "that no person can be considered a

party to a bill unless his name or the name of the firm of which he is a partner appear on some part of it;" citing Chit. Bills, 22; Fenn *v.* Harrison, 3 Term R. 761; Emly *v.* Lye, 15 East, 7. And this rule is universally accepted as the law by the recent text-writers on commercial paper. Tied. Com. Paper, § 87; Rand. Com. Paper, § 131. "The reason of this rule is that each party who takes a negotiable instrument makes his contracts with the parties who appear on its face to be bound for its payment. It is 'a courier without baggage,' whose countenance is its passport; and in suits upon negotiable instruments no evidence is admissible to charge any person as a principal thereto unless his name in some way is disclosed upon the instrument itself." 1 Daniel Neg. Inst., § 303; Mechem Ag., pp. 285–287; Heaton *v.* Myers, 4 Colo. 55. And another good reason for the rule is that every part of commercial paper must be definite and certain and contained in the body of the paper itself, so that every taker and holder understands exactly what his rights in and to it are, and with whom he is contracting. Counsel for respondents claim that this doctrine has been repudiated by this court in a number of decisions, and the importance of the question, and the earnestness with which this is urged, demand that we should state our reasons for declining to take that view of the case. The leading case relied upon by respondents is Washington &c., Ins. Co. *v.* St. Mary's Seminary, 52 Mo. 480. The note which was the basis of the action in that case was as follows: "$750. For value received in policy No. 2,969, dated the fourteenth day of March, 1866, issued by the Washington Mutual Fire Insurance Company of St. Louis, I promise to pay said company (or their secretary for the time being) the sum of seven hundred and fifty dollars, in such portions and at such time or times as the directors of said company may agreeably to their acts of incorporation require. Daniel McCarthy, Prest. Per Thomas Burke." This court held that it was competent to explain the ambiguity on the face of the note itself. Speaking for the court, Judge Sherwood said in that case: "In the present case the note sued on is signed 'Daniel McCarthy, Prest.' But president of what? Just here, under the rules laid down in the above cases, parol evidence steps in, and affords a ready and satisfactory explanation. The word 'Prest.,' attached to the name of Daniel McCarthy, is an ear-mark of the official capacity in which the note was signed,— not evidence, it is true, that the note was signed in that capacity, but a sufficient basis for the introduction of testimony tending to establish that fact." Moreover, in that case the note on its face referred to policy No. 2,969, which insured the seminary building and church building belonging to St. Mary's Seminary. It will be observed, first, that the above note is not negotiable, and, secondly, that the ambiguity appears on its face, growing out of the word "Prest.," affixed to McCarthy's name. In the case at bar the notes are by their terms negotiable, and contain nothing but Jackson's name as maker; so that this case is not authority, because the facts

are entirely different. It is true, however, that in this case Judge Sherwood quotes from the decision in Mechanics' Bank of Alexandria *v.* Bank of Columbia, 5 Wheat. 327, in which the supreme court of the United States says: "It is by no means true, as was contended in argument, that the acts of agents derive their validity from professing on the face of them to have been done in the exercise of their agency." If this were all, it must be conceded that respondents are justified in claiming that this decision is broad enough to permit parol evidence in any case to explain who was the principal, notwithstanding there is no intimation on the face of the paper that any one but the agent is a party to it. But the supreme court of the United States did not put their decision on that ground; but, on the contrary, Justice Johnson, who delivered the opinion, expressly says: "But the fact that this appeared on its face to be a private check is by no means to be conceded; on the contrary, the appearance of the corporate name of the institution on the face of the paper at once leads to the belief that it is a corporate, and not an individual, transaction; to which must be added that the cashier is the drawer, and the teller the payee, and the form of ordinary checks deviated from by the substitution of 'to order' for 'to bearer.' The evidence, therefore, on the face of the bill predominates in favor of its being a bank transaction. But it is enough for the purposes of the defendant to establish that there existed on the face of the paper circumstances from which it might reasonably be inferred that it was either one or the other, and in such a case to resort to extrinsic evidence to remove the doubt." So that it seems clear that the supreme court placed its decision upon the fact that upon the face of the paper the ambiguity appeared. That court would never have held that there was any ambiguity on the face of the notes sued on in the third, fourth and fifth counts in the case at bar. Falk *v.* Moebs, 127 U. S. 597; 8 Sup. Ct. Rep. 1319.

In Smith *v.* Alexander, 31 Mo. 193, the action was on the following note: "$500. St. Louis, Mo., July 22, 1855. Ninety days after date I promise to pay to the order of Messrs. Smith & Co., five hundred dollars, for value received, negotiable and payable without defalcation or discount. J. H. Alexander, Treasr., Ohio & Miss. R. R. Co." In that case Alexander, having been sued on his note, was allowed to show that he was treasurer of the said railroad, and that he gave the note simply as agent of said company, Judge Ewing saying: "A mere addition to the name of the party signing the contract cannot be regarded as a certain indicium that it was made on behalf of another. Where, however, it is doubtful from the face of the contract whether it was intended to operate as a personal engagement of the party signing it or to impose an obligation on some third person as principal, evidence is admissible to show the character of the transaction." So we see that Judge Ewing places his ruling on the doubt appearing on the face of the note, whether it was the obligation of Alexander or the railroad company. Shuetze *v.* Bailey, 40 Mo.

69, was an action on a contract for half the value of a partition wall. It was not a negotiable instrument at all, and in that case the contract was signed, "Kenneth McKenzie, Agent for Volney Stevenson, on the first part," so that case is not similar in any legal feature to the one at bar. In Musser *v.* Johnson, 42 Mo. 74, action was brought on a written assignment of a certain claim against Johnson and others by Isaac H. Sturgeon, president North Missouri Railroad Company, "attested with the seal of the company, and countersigned by George H. Blood, Sec'ry N. M. R. R. Co." It was held to be the act of the company. The instrument was not negotiable, and the paper on its face clearly showed it was the intention to assign the railroad company's right. The next case we are cited to is Ferris *v.* Thaw, 72 Mo. 446. In that case the note or instrument read: "$4,000, St. Louis, Mo., Oct. 3d, 1870. Twelve months after date I promise to pay to the order of John W. Luke, treasurer, $4,000. without defalcation or discount, for value received, negotiable and payable at the Third National Bank of St. Louis, with ten per cent interest from date, payable semi-annually. Charlie Thaw, W. M. Polar Star Lodge No. 79. Indorsed: John W. Luke, Treasurer." In that case the defendants were sued as members of Polar Star Lodge No. 79 of Ancient Free and Accepted Masons. Defendant Thaw was its chief officer, with the title of worshipful master. In that case it was shown that the lodge was an unincorporated body; that it had borrowed this $4,000 for lodge purposes. The loan was reported to the lodge and was approved at its meeting, all the defendants voting therefor. It will be observed that in this case the ambiguity appears on the face of the paper, and the court properly permitted evidence to show who were the real principals, and the members of the lodge which received the money were held on it. It is true the learned judge quotes from Story on Agency and uses language that might be construed to include any undisclosed principal; but it is not practicable in every case to go over the entire law, and point out all the qualifications that might be mentioned, and when the law, as quoted, applies to the controlling facts in the case, it must be understood as referring to those facts. It is clear to us that the learned judge who delivered that opinion had no intention of discussing the proposition now under consideration. The case was placed upon the ground that, the lodge having failed to become a corporation, its members were liable as copartners; and they were all shown to have ratified the act of the worshipful master, and his agency appeared on the paper itself, so that it was unnecessary to discuss the question as to the liability of a person on an instrument to which he was not a party. Martin *v.* Fewell, 79 Mo. 401; Richardson *v.* Pitts, 71 Mo. 128. It remains only to notice Franklin Ave. Ger. Sav. Inst. *v.* Board of Education, 75 Mo. 408. That was an action on school bond, as follows: "It is hereby certified that the special school district of the town of Roscoe, county of St. Clair, State

of Missouri, is indebted to ———, or bearer, in the sum of $500, payable * * * This bond is issued under and by virtue of an act of the legislature of Missouri entitled 'An act to authorize cities, towns, and villages to organize for schools with special privileges.' Jas. Smanger, Prest. Henry Swann, Secretary." Of course, on the face of this bond, it was the bond of the school-district, and no such question as the one at bar was before the court. In Snider *v.* Express Co., 77 Mo. 525, Snider was the consignor of the lost package, and this court held that, although the package was the property of his sister Louisa, Snider was the trustee of an express trust, and authorized to sue. No question of negotiable paper was involved in the case, so that it will appear from an examination of each of the cases relied on by respondents as sustaining the action of the court in admitting parol evidence to show that Jackson was in fact the president and purchasing agent of appellant, and executed the three notes described in third, fourth, and fifth counts in behalf of said company, that they are all unlike this case, in that in each of them there was some addition, such as "president," "worshipful master," "treasurer," or some title designating an agency on the face of the paper itself, and in such cases the law permits the ambiguity to be explained; and, indeed, in all other contracts except bills of exchange and negotiable promissory notes it is always permissible to show by parol evidence who is the real principal. Tied. Com. Paper, § 87, and authorities cited. But wherever the cases have been reviewed we think it will be found that, although the rule has been relaxed in those cases where the maker or drawer adds the word "agent," or "president," or the like after his name, yet in negotiable instruments, when the principal's name does not appear, he is not liable on the bill or note as a party to the instrument. Devendorf *v.* Oil Co., 17 W. Va. 135; Fuller *v.* Hooper, 3 Gray, 341; Williams *v.* Robbins, 16 Gray, 77; Pease *v.* Pease, 35 Conn. 131; Keck *v.* Brewing Co., 22 Mo. App. 187; Bartlett *v.* Tucker, 104 Mass. 339.

What we have here said is not in conflict with another equally well-settled rule, that a party may bind himself by another than his true name, where he signs any instrument with intent to bind himself, or signs any name under which he is shown to have held himself out to the world and carried on business. In these cases he is as much liable as if he had signed his true name. Bartlett *v.* Tucker, 104 Mass. 339. With this view of the law, then, we hold the court erred in the admission of parol evidence to show that Jackson executed the three notes sued on in third, fourth, and fifth counts, and in giving instruction No. 8, as prayed by plaintiffs. In regard to the refusal to give the twenty-third instruction asked by defendant, we think the court committed no error. We do not think any such issue was properly tendered the plaintiffs, nor do we think there was sufficient evidence to justify it, if properly pleaded. We are driven by our views of the law to affirm the judgment of the circuit court on the first and second

counts, and reverse the judgment on the third, fourth, and fifth counts. Hunt *v.* Railway Co., 89 Mo. 607; 1 S. W. Rep. 127, and cases cited. All judges of division No. 2 concur.

Executor as a Party to Bill or Note.

Schmittler *v.* Simon, 114 N. Y. 176 (21 N. E. 172).

Appeal from supreme court, general term, First department.

Action by Mary Schmittler against Adam Simon, as an acceptor of a draft of which the following is a copy: "New York, February 26, 1877. Mr. Adam Simon, executor, will please pay to Johannes Schmittler, or his order, on the first day of July, which will be the year 1879, the sum of nine hundred doll., with seven per cent interest, to be paid, besides the amount, yearly, July month, and charge the amount against me, and of my mother's estate. Wm. J. Scharin." Across the face was written: "Accept, Adam Simon, Executor," and indorsed: "Pay to the order of Mary Schmittler the amount of note. Johannes Schmittler." A trial resulted in a judgment of nonsuit, which was affirmed by the general term (29 Hun, 480, *mem.*), but reversed by the court of appeals (5 N. E. Rep. 452). A second trial resulted in a verdict and judgment for the plaintiff for the amount of the draft, which was affirmed by the general term (43 Hun, 640, *mem.*), and the defendant appeals.

Bradley, J. Upon the review of a former trial, where the question presented had relation only to the legal import of the terms of the instrument in question, it was held that it was a bill of exchange, and that the defendant was, upon his acceptance, personally liable to the plaintiff as indorsee of the paper. 101 N. Y. 554; 5 N. E. Rep. 452. This is the review of the succeeding trial, and the admissibility of evidence offered by the defendant is now the subject of inquiry. The defendant was executor of the will of Regina Scharen, deceased. She was the mother of the drawer of the draft. There is some evidence tending to prove that the draft was taken by the payee for the plaintiff, who was his wife, or with a view to transfer it to her. The defendant offered evidence tending to prove that it was understood by the plaintiff and her husband that the draft should be taken upon the security of the drawer's interest in the estate of his mother; that when the draft was drawn it was understood between the drawer, payee, and the plaintiff that it was to be paid out of such interest in the estate; also, that the defendant then said, in the presence of all those parties, that he would not accept the draft, or become liable upon it personally, and that it was then agreed or said between them that the defendant would accept the draft in his capacity as executor, to be paid only out of the drawer's interest in his mother's estate. This evidence was offered in various forms on inquiry, and, upon objection of plaintiff's counsel, was excluded, and exceptions taken. The general rule is that when an agree-

ment is reduced to writing, it, as between the parties, is deemed to merge and overcome all prior or contemporaneous negotiations and declarations upon the subject, and that no oral evidence is admissible to vary, explain, or contradict its terms. But it may be that it would have been admissible for the defendant to prove, if he could, that his acceptance was not to take effect as such until a certain event, then in the future, and that when the payee and the plaintiff received it they were advised of an arrangement to that effect. Seymour *v.* Cowing, 40 N. Y. 532; 4 Abb. Dec. 200; Benton *v.* Martin, 52 N. Y. 570; Reynolds *v.* Robinson, 110 N. Y. 654; 18 N. E. Rep. 127; Wilson *v.* Powers, 131 Mass. 539; Wallis *v.* Littell, 11 C. B. (N. S.) 368. In this connection reference may also be made to the proposition that the purpose for which a written contract is made may rest in a collateral oral arrangement, which may be shown, to the effect that the design of it is different from that which its terms alone may indicate. Grierson *v.* Mason, 60 N. Y. 394; Juillard *v.* Chaffee, 92 N. Y. 529; Chapin *v.* Dobson, 78 N. Y. 74. These propositions are not applicable when the conclusion is required that the writing contains the final consummation of the entire agreement between the parties. While the evidence so offered may bear the construction that there was an understanding between the parties to the draft that the liability of the defendant on the acceptance was dependent upon an ascertained interest of the drawer in the estate of his mother, and in that event to be incurred to the extent only of such interest, not exceeding the amount of the draft, we think such evidence cannot fairly be construed as tending to prove a collateral agreement suspending the inception or operation of the acceptance until some future event, or as tending to show that it was made for a purpose independent of the import of its terms, within the rule before mentioned, and therefore it is unnecessary to consider the question of the applicability of those propositions to negotiable paper.

The consideration of a contract, in whatever form it may have been, may, as between the immediate parties to it, be the subject of inquiry, and, in an action by the payee upon a note made by an executor or administrator, on account of a debt which his testator or intestate left unpaid, such fact, and that the assets of the estate were insufficient to pay the note, may be shown as a defense, wholly or partially, as it may appear that there was an entire or partial want of assets to pay the debt represented by the note. Bank *v.* Topping, 9 Wend. 273; 13 Wend. 557. The question in such case is one of consideration for the promise, evidenced by the note, supposed to have been founded wholly upon the assets of the estate which the maker represented. While the maker and payee of a promissory note, and the drawer and acceptor of a bill of exchange, are immediate parties to the paper, that relation of privity does not exist between the payee and acceptor, and, as between them alone, the want of consideration is no defense; but the acceptor, for the purpose of his

defense in that respect, must go further, and prove that there was no consideration as between the drawer and payee. There was no purpose indicated in the evidence offered to do that, and therefore it does not seem to have been competent for that purpose.

The question now is whether the evidence so offered was admissible for any purpose. On the former review, in referring to the contention that the draft was drawn upon a specific fund, the court said: "Considering the question, as we are compelled to do, from the language of the instrument alone, we are unable to agree to the interpretation that the draft was payable only from a particular fund," — and added: "While the point is not free from doubt, we think a reasonable construction of the draft favors the conclusion that it [the fund] is mentioned only as a source of reimbursement;" and, "if the language of the paper could be considered at all ambiguous, it was the duty of the defendant to limit his liability by apt words of acceptance when it was presented to him, but, as it is, he has unqualifiedly promised to pay a fixed and definite sum at a specified time, and we think should be held to the contract which other parties were authorized, by his acceptance, to infer he intended to make." It does not appear what view the court may have taken of the admissibility of evidence of the fact, and of the fact itself, if it had then appeared, that the payee and the plaintiff, when they received the draft, had been advised that it was drawn and accepted to be paid out of the drawer's interest represented by the defendant as executor. The question there was solely one of construction of the instrument as represented by its terms, and all that the court there necessarily determined was that it did not appear by the terms of the draft that it was drawn upon a particular fund. That character would not be given to the draft upon doubtful construction, as against the plaintiff, who was presumed to be a *bona fide* holder of it. The fact that the drawee was, in the draft, designated as executor, and that he added the like designation to his name subscribed to the acceptance, would not, of itself, import any other than a personal relation of the defendant to the instrument, as the word "Executor" annexed to his name would presumptively be treated as merely descriptive of the person, but it might be given some substantial significance by other provisions, if those were such as to require it in the instrument, and in a proper case this might be aided by extrinsic facts.

The defendant, as executor, represented whatever interest the drawer of the draft had in the estate of Mrs. Scharen, deceased, and such interest must be obtained by him or whomsoever should become entitled to it through the executor. That situation would have rendered a draft upon the latter for that purpose, and his acceptance so qualified, legitimate. In that view it would seem that if the understanding of the parties to the draft and the holder of it was such, the *prima facie* import of the word "exec-

utor" might be overcome by evidence to the effect that it was used to qualify the liability of the defendant, and to show that it was assumed in his representative capacity only. This rule is applicable to other relations of a representative character, in like manner indicated, although the contract does not, in its terms, purport to have been made by or for the principal, otherwise than by way of designation of the representative character of the person making it. The like presumption exists in that as in this case, that the added designation is *descriptio personæ;* and the right to show the fact to be otherwise is dependent upon the knowledge of the other party to the contract that such was the purpose when it was made. Brockway *v.* Allen, 17 Wend. 40; Paddock *v.* Brown, 6 Hill, 530; Hicks *v.* Hinde, 9 Barb. 528; Horton *v.* Garrison, 23 Barb. 176; Bank *v.* Leonard, 40 Barb. 136; Bowne *v.* Douglass, 38 Barb. 312; Lee *v.* M. E. Church, etc., 52 Barb. 116; Babcock *v.* Beman, 11 N. Y. 200. In such case it is open to explanation by evidence to show that the purpose, as understood by the parties to the transaction, was that the party so executing the contract intended to assume no personal liability. (Hood *v.* Hallenbeck, 7 Hun, 362–365, and cases before cited), and, when aided by such evidence, the fact that a payee in a note who indorses it, and a drawee in a draft who accepts it, are, as well as in the indorsement and acceptance, in that manner designated, may be entitled to some significance. Bowne *v.* Douglass, supra; Babcock *v.* Beman, 11 N. Y. 200. The distinction between the cases referred to and the present one is that there was a principal whose representative made the contract, which was a fact essential to the application of such rule upon the question of liability, while here the defendant as executor had no principal party to charge with liability upon his contract, and could represent no person as such. But he had duties to perform as executor, in relation to the estate of his testatrix, among which was the duty to render his account, and pay over, for the benefit of persons interested, such shares as they were entitled to from the estate. And if it was intended by the draft and acceptance, and such construction can, by aid of extrinsic facts, be allowed, that the defendant should be charged in the line of his representative duty merely, it would follow that he would be required to pay to the holder of the instrument to the extent of the sum mentioned, from the interest of the drawer in the estate, if it were sufficient for the purpose. That would be a proper liability of the defendant as such trustee, and the drawer and payee might depend upon the existence of that fund for payment. In the case of agency there is no fund, but a principal, to charge. It is difficult to see any well-founded distinction for the application in the two classes of cases of the rule which permits the introduction of evidence to show the intention and purpose in that respect of the parties to and interested in the transaction, who were advised of such purpose when they assumed their relation to the contract.

In Pinney *v.* Administrators, etc., 8 Wend. 500, this question did not arise. There the administrators had been charged by judgment upon their bond to a third party, on account of a debt due from their intestate, and which they alleged as a liability of the estate, and a deficiency of assets, by way of defense. The replication charged that the defendants had sufficient assets to pay the judgment and the plaintiff's claim, etc. The question arose upon the demurrer to the replication. The plaintiff had judgment, with leave to the defendant to rejoin. The court held that the judgment upon the bond of the administrators did not bind the estate, although the bond purported to have been made by them in their representative capacity. It is evident, if they had any defense within the case of Bank *v.* Topping, supra, it did not survive the recovery of the judgment upon it. If the presumption arising out of the *prima facie* relation assumed by the defendant to the draft in question prevail, he must be personally liable within the doctrine of the case last cited. We are not prepared to say that in the present case the defense will be aided by the words, "against me and by my mother's estate," in the draft, or any construction which may be put upon them. There is certainly some obscurity as to the purpose for which they were used, and they may be said to present some ambiguity. For the purpose of the construction of the instrument, no words can be added or taken from its provisions; but where the words used, in their application to an instrument of which they are a part, are not entirely intelligible, parol evidence of the circumstances attending its execution may, as between the parties, be admissible to aid in the interpretation in its application of the language so used. Fish *v.* Hubbard, 21 Wend. 651-662; Field *v.* Munson, 47 N. Y. 211.

For the reasons before given, we think the rejected evidence referred to should have been received, as bearing upon the understanding of the relation and the character of liability the defendant assumed by its acceptance of the draft. It is deemed admissible, in view of the designation which was given to the defendant in the draft, and in his acceptance of it, and by what appears on the face of the draft. Hicks *v.* Hinde, 9 Barb. 531; Powder Co. *v.* Sinsheimer, 48 Md. 411. This view is taken upon the assumption, as the offered evidence indicated, that the plaintiff and her husband were advised when they received the draft of the facts embraced in the offers of proof. Otherwise the draft, as to the plaintiff, must, as on the former review, be treated as a negotiable bill of exchange, and no other interpretation can, by evidence of extrinsic circumstances, be given, nor for that purpose will the evidence be admissible. The fact that the draft was payable at a particular time and place may be a circumstance entitled to consideration upon the merits, but they do not have the conclusive effect claimed for them by the plaintiff's counsel, and the same be said in respect to the payments heretofore made by the defendant of interest upon the amount of the draft. We

do not consider the effect of the acceptance by way of admission of assets in his hands belonging to the estate, or the force to which it may be entitled as such. The only question now here arises upon exceptions to the exclusion of evidence, which seem to have been well taken, and for that reason the judgment should be reversed, and a new trial granted, costs to abide the event. All concur, except Vann, J., dissenting.

CHAPTER V.

THE CONSIDERATION, AS IT AFFECTS BONA FIDE OWNERSHIP.

SECTION 50. Necessity of consideration — What instruments import a consideration.
51. Between whom question of consideration may be raised — Bona fide holders.
52. Real and apparent relation of parties.
53. One consideration supporting the obligations of more than one.
54. Accommodation paper.
55. Money consideration — Contemporary loans, future advances and existing debts.
56. When is a pledgee a *bona fide* holder for value.

§ 50. **Necessity of consideration — What instruments import a consideration.**— It is the universal rule of the English and American law that no executory contract can be enforced in the courts, unless it be supported by a valuable consideration. And the rule applies to bills and notes without qualification; except that by the commercial law, every species of commercial paper, bills, notes, checks, etc., import a consideration. Whenever, therefore, a bill, note or check, is proven to have been duly executed and delivered, a sufficient consideration for such a contract will be presumed, until the want of consideration is affimatively established.[1] And, although it was once held in England to be necessary to the validity of negotiable instruments that a consideration be acknowledged in it, usually by the employment of the phrase "for value received," it is now generally held that no such acknowledgment is necessary, unless local

[1] Bristol *v.* Warner, 19 Conn. 7; Townsend *v.* Derby, 3 Met. 363; Carnwright *v.* Gray, 127 N. Y. 92 (27 N. E. 835); Hughes *v.* Wheeler, 8 Cow. 77; Foster *v.* Paulk, 41 Me. 425; Hartman *v.* Shaffer, 71 Pa. St. 312; Campbell *v.* McCormac, 90 N. C. 441; Ingersoll *v.* Martin, 58 Md. 67 (42 Am. Rep. 322); Martin *v.* Stone (N. H.), 29 A. 845; Matteson *v.* Morris, 40 Mich. 52; Wilson *v.* Wilson, 26 Oreg. 315; 38 P. 189.

statutes, regulating such paper, expressly require it.[1] This presumption of consideration does not attach to every kind of commercial obligation. It applies only to sealed instruments,[2] and negotiable or quasi-negotiable paper. While the omission of the words of negotiability, from what would otherwise be a negotiable bill or note, will not destroy this presumption of consideration;[3] the presumption does not apply to a bill or note, which is altogether non-negotiable, because it lacks one or more essential elements of negotiable paper; as, for example, where the time of payment, or the amount payable, is uncertain.[4] In such cases, the presumption will arise only from an express acknowledgment of the consideration.[5] The presumption of consideration applies, not only to the original note or bill, but likewise to all indorsements of the same,[6] and to acceptance of bills.[7]

§ 51. **Between whom question of consideration may be raised — Bona fide holders.**— It is a general rule of the law of Commercial Paper, that defenses, not apparent on the face of the instrument, can be set up against only the original parties and those subsequent indorsees and holders who take the instrument with notice of the defense, or without value. The illegality or want of consideration is one of those defenses, which do not generally appear upon

[1] See *ante*, § 24.

[2] Conway *v.* Williams, 2 Hun, 642; Webster *v.* Bailey, 118 N. C. 193 (24 S. E. 9).

[3] Haydock *v.* Lynch, 2 Ld. Raym. 1553; Averett's Adm'x *v.* Booker, 15 Gratt. 163 (76 Am. Dec. 203). And see Coursin *v.* Ledlie, 31 Pa. St. 506.

[4] Atkinson *v.* Manks, 1 Cow. 691; Bilderbach *v.* Burlingame, 27 Ill. 338; Frank *v.* Irgins, 27 Minn. 43 (6 N. W. 380); Bristol *v.* Warner, 19 Conn. 7; Birclebach *v.* Wilkins, 22 Pa. St. 26.

[5] Bourne *v.* Ward, 51 Me. 191; Courtney *v.* Doyle, 10 Allen, 122; Wingo *v.* McDowell, 8 Rich. 446. But see *contra*, Stewart *v.* Street, 10 Cal. 372.

[6] Dumont *v.* Williamson, 18 Ohio St. 515 (98 Am. Dec. 186); Connerly *v.* Planters &c. Ins. Co., 66 Ala. 432; Johnston *v.* Dickson, 1 Blackf. 256.

[7] Kendall *v.* Galvin, 15 Me. 131 (32 Am. Dec. 141).

the face of a bill or note. Such a defense would therefore prevail in any action between the original parties above described, between maker and payee of a note, between the drawer or acceptor and payee of a bill, etc.[1] But, in order that want of consideration may be a good defense to an action on the note or bill by an indorsee or other subsequent holder, it must be proven that the subsequent holder is not a *bona fide* holder, *i. e.*, a holder for value and without notice.[2] An exception to this general rule is maintained by most of the cases in respect to the defense of illegality of consideration. Where the consideration is declared by decisions of the courts, or by statute, to be simply void on account of illegality; a bill or note, based upon such illegal consideration, would be void as to

[1] Hunt *v.* Mason, 21 D. C. 181: Preble *v.* Hunt, 85 Me. 267 (27 A. 151); Eastman *v.* Shaw, 65 N. Y. 522; Shaw *v.* Outwater, 77 Hun, 87; Thomas *v.* Watkins, 10 Wis. 549; Gibert *v.* Siess, 40 La. Ann. 667 (4 So. 874); Bank of Ohio Valley *v.* Lockwood, 13 W. Va. 392 (31 Am. Rep. 768); Pettyjohn *v.* Liebscher, 92 Ga. 149 (17 S. E. 1007); Toombs *v.* West, 94 Ga. 280 (21 S. E. 522); Third Nat. Bk. *v.* Harrison, 3 McCrary, 316; Paxson *v.* Nields, 137 Pa. St. 385 (20 A. 1016); Ingersoll *v.* Martin, 58 Md. 67 (42 Am. Rep. 322); Schroeder *v.* Nielson, 39 Neb. 335 (57 N. W. 993); Williams *v.* Forbes, 114 Ill. 171 (28 N. E. 463); Richardson *v.* Richardson, 148 Ill. 563 (36 N. E. 608); Hanks *v.* Brown, 79 Iowa, 560 (44 N. W. 811); Merrill *v.* Packer, 80 Iowa, 543 (45 N. W. 1076). But want of consideration between drawer and acceptor, or between the acceptor and payee, is no defense if he has paid a valuable consideration to the drawer. Hoffman *v.* Bank of Milwaukee, 12 Wall. 191. Nor can the acceptor raise the question of failure of consideration, where there is a consideration between himself and the drawer of the bill, and there is no consideration between the drawer and the payee. Hunt *v.* Johnston, 96 Ala. 130 (11 So. 387).

[2] Sweetser *v.* French, 13 Met. 262; Kellogg *v.* Curtis, 69 Me. 212 (31 Am. Rep. 273); Goodman *v.* Simonds, 20 How. 343; Collins *v.* Gilbert, 94 U. S. 753; Matthews *v.* Crosby, 56 N. H. 21; Mechanics' &c. Bk. *v.* Crow, 60 N. Y. 85; Harger *v.* Worrall, 69 N. Y. 370 (25 Am. Rep. 206); Sloan *v.* Union Banking Co., 67 Pa. St. 470; Nat. Bk. of America *v.* Nat. Bk. of Ill., 164 Ill. 503 (45 N. E. 968); Hunter *v.* Parsons, 22 Mich. 96; Gotzian *v.* Steinkamp, 53 Minn. 462 (55 N. W. 602); Kahm *v.* King Bridge Mfg. Co., 16 Kan. 530; Ethridge *v.* Gallagher, 55 Miss. 458; Rea *v.* McDonald (Minn. '97), 71 N. W. 11; New *v.* Walker, 108 Ind. 365 (9 N. E. 386); Van Meter *v.* Spurrier, 94 Ky. 22 (21 S. W. 337); Fernekes *v.* Bergenthal, 69 Wis. 464 (34 N. W. 238); De Long *v.* Barnes, 45 Ohio St. 237 (12 N. E. 735.)

the original parties, and others who take it with notice or without value, but it could be enforced by a *bona fide* holder.[1] But where the consideration is made illegal by statute, and the statute expressly declares the contract founded on such consideration to be *absolutely void*, the language of the statute is given its full effect; and the courts have held that the defense will prevail in such cases, even against *bona fide* holders of negotiable papers.[2] The same effect is produced on the rights of *bona fide* holders, as well as on the rights of the immediate parties, whether the illegality affect the whole or only a part of the consideration, where the consideration is one and indivisible. But where a bill or note is given for two distinct and separate considerations, the instrument is void or voidable only *pro tanto*, where only one of the considerations is illegal.[3] So, also, where the partial invalidity is due to a partial failure or an innocent misstatement of the amount, the note will be invalidated *pro tanto*.[4] The question, on whom rests the burden of proof of *bona fide* ownership, where the defense is want, failure or illegality of consideration is discussed in a subsequent chapter.[5]

[1] Holmes *v.* Williams, 10 Paige, 326 (40 Am. Dec. 250); Grimes *v.* Hillenbrand, 4 Hun, 354; Bangs *v.* Hornick, 30 Fed. 97; Doolittle *v.* Lyman, 44 N. H. 608; Fay *v.* Fay, 121 Mass. 561; Gorham *v.* Keyes, 137 Mass. 583; Sondheim *v.* Gilbert, 117 Ind. 71 (18 N. E. 776); Town of Eagle *v.* Kohn, 84 Ill. 292; Crawford *v.* Spencer, 92 Mo. 498 (4 S. W. 713); Lynchburg Nat. Bank *v.* Scott, 91 Va. 652 (22 S. E. 487); Corbin *v.* Wachhorst, 73 Cal. 411 (15 P. 22); Bradshaw *v.* Van Valkenburg, 97 Tenn. 316 (37 S. W. 88).

[2] Halch *v.* Burroughs, 1 Woods, 439; Bayley *v.* Tabor, 5 Mass. 286 (4 Am. Dec. 57); Weed *v.* Bond, 21 Ga. 195; Woods *v.* Armstrong, 54 Ala. 150 (25 Am. Rep. 671); Tatum *v.* Kelley, 25 Ark. 209 (94 Am. Dec. 717); Glen *v.* Farmers' Bank, 70 N. C. 191; Union Bank of Rochester *v.* Gilbert, 83 Hun, 417; Ramsdell *v.* Morgan, 16 Wend. 574; Hunt *v.* Knickerbocker, 5 Johns. 372; Griffiths *v.* Wells, 3 Denio, 226; Union Nat. Bank *v.* Brown (Ky. '97), 41 S. W. 273.

[3] Brigham *v.* Potter, 14 Gray, 522; Saratoga Bank *v.* King, 44 N. Y. 87; Guild *v.* Belcher, 119 Mass. 257; Widoe *v.* Webb, 21 Ohio St. 431 (5 Am. Rep. 664); Barnard *v.* Backhaus, 52 Wis. 593 (6 N. E. 252; 9 N. E. 595); Everhart *v.* Puckett, 73 Ind. 409.

[4] Phelps Dodge & Palmer Co. *v.* Hopkinson, 61 Ill. App. 400.

[5] See *post*, chapter IX. on Rights of Bona Fide Holders.

If the consideration of an original note or bill is illegal, the illegality will taint the renewal of the instrument, in every case where the entire consideration is illegal; and where only a part of the consideration is illegal, the renewal will still be subject to the defense of illegality *pro tanto*, unless the illegal part of the consideration has been excluded from the renewal. And the same rule governs, where one note or bill is given in renewal of two or more original bills or notes, one of which is founded upon an illegal consideration.[1] But where the proceeds of the negotiation of the new note are applied without the knowledge of the payee to the settlement of the old note, which is tainted by fraud or illegality of the consideration, the second note is valid.[2]

§ 52. **Real and apparent relation of parties.**—The real relation of the parties does not always appear on the face of the paper; and whenever the apparent relation of the parties differs from the real, it is always competent for the purpose of admitting or excluding the defense of consideration, to show by parol evidence what the true relation of the parties is. Thus the name of the payee and indorsee is often left blank, and the blank filled up afterwards with the name of a subsequent holder, thus making him appear as the payee or prior indorsee. In all such cases, it is competent for such a person to show that he is not the original payee or immediate indorsee, and thus exclude the defense of want or illegality of the consideration from his action on the instrument.[3] It may also be shown that the drawer, instead of the acceptor, is the primary debtor, thus

[1] Doty *v.* Knox Co. Bank, 16 Ohio St. 133; Alabama Nat. Bank *v.* Halsey, 109 Ala. 196 (19 So. 520); Wegner *v.* Biering, 73 Tex. 89 (11 S. W. 155); Exeter Nat. Bank *v.* Orchard, 39 Neb. 485 (58 N. W. 144); Rash *v.* Farley, 91 Ky. 344 (15 S. W. 862).

[2] Buchanan *v.* Drovers' Nat. Bank, 55 Fed. 223; 6 U. S. App. 566; Ross *v.* Webster, 63 Conn. 64 (26 A. 476). See Cohn *v.* Husson, 113 N. Y. 662 (21 N. E. 703).

[3] Hoffman *v.* Bank of Milwaukee, 12 Wall. 181; Nelson *v.* Cowing, 6 Hill, 336; Aldrich *v.* Stockwell, 9 Allen, 45; Rich *v.* Starbuck, 51 Ind. 87; Glascock *v.* Robards, 14 Mo. 350 (55 Am. Dec. 108).

rebutting the general presumption that the acceptor is the primary debtor, where the question arises between the immediate parties, the drawer and the acceptor. But as to all other parties, the presumption, that the acceptor is the primary debtor, is conclusive.[1] In no case can the real relation of the parties be shown to be different from their apparent relation, as against a subsequent *bona fide* holder.[2]

§ 53. **One consideration supporting the obligations of more than one.**— Not only may the promise of one be supported by a consideration moving to another, as in the case of a guarantor; but the same consideration will support the promises of all who are induced thereby to assume obligations. Co-makers of bills or notes, whether as joint-principals, or as principal and surety, are almost invariably bound by one consideration.[3] This is likewise the case with one who indorses for another's accommodation, if made when or before the loan was negotiated; the indorsement constitutes a part of the original agreement and needs no independent consideration.[4] But in every case, where parties join in the assumption of the same liability as co-makers of a note, or of different liabilities arising out of the same transaction, as maker and indorser; the promises of all must be made before the consideration is executed, in order that the one consideration may support all the promises. An executed consideration cannot support a subsequent

[1] Turner, Wilson & Co. *v.* Browder, 5 Bush, 216; Trego *v.* Lowery, 8 Neb. 238.

[2] Munroe *v.* Bordier, 8 C. B. 862; U. S. Nat. Bank *v.* First Nat. Bank, 64 Fed. 985; 13 C. C. A. 472; South Boston Iron Co. *v.* Brown, 63 Me. 139; Lea *v.* Cassen, 61 Ala. 312; First Nat. Bank *v.* Weston, 88 Hun, 29.

[3] Kinsman *v.* Birdsall, 2 E. D. Smith, 395; Hoxie *v.* Hodges, 1 Oreg. 251; Hapgood *v.* Polley, 35 Vt. 649; Rutland *v.* Brister, 53 Miss. 683; McClelland *v.* McClelland, 42 Mo. App. 32.

[4] Austin *v.* Boyd, 24 Pick. 64; Robertson *v.* Rowell, 158 Mass. 94 (32 N. E. 898); Powers *v.* French, 1 Hun, 582; Leonard *v.* Sweetzer, 16 Ohio, 1; Seyfert *v.* Edison, 45 N. J. L. (16 Vroom) 393; Brenner *v.* Gundersheimer, 14 Iowa, 82; Hoover *v.* McCormick, 84 Wis. 215 (54 N. W. 505); Emery *v.* Hobson, 62 Me. 578 (16 Am. Rep. 513); North Atchison Bk. *v.* Gray, 114 Mo. 203 (21 S. W. 479); Leverone *v.* Hildreth, 80 Cal. 139 (22 P. 72).

promise. If, therefore, after the debt is contracted and the note delivered, the maker should procure the signature of another on such note, whether as co-maker, surety or indorser, this later signature does not create any liability in respect to the parties in immediate privity with the obligor, unless it is supported by a fresh consideration.[1] Where, however, the subsequent indorsement or signing of the paper is made in performance of a prior promise to the payee, to so indorse the paper as an additional inducement for the loan or other consideration of the note, it is held that no additional consideration is needed to hold the indorser liable. And the indorser will be bound by his subsequent indorsement, under these circumstances, whether the prior promise of a subsequent indorsement was made by him or by the maker. It is the fact, that the payee made his loan in reliance upon this promise of an additional indorsement, and not the participation of the indorser in making the promise, or his knowledge of the promise, which makes the original consideration sufficient to support the indorsement.[2]

§ 54. **Accommodation paper.**— When one lends his mercantile credit to another, by signing his name to an instrument in the character of maker, drawer, acceptor or indorser; the instrument, so far as such signature is concerned, is called *accommodation paper*. The obligation, arising out of this signature, is assumed for the accommodation of another, and is not supported by any consideration moving to the person so signing. Therefore, as

[1] Good *v.* Martin, 95 U. S. 90; Stone *v.* White, 8 Gray, 589; Pratt *v.* Hedden, 121 Mass. 116; Sawyer *v.* Fernald, 59 Me. 500; Gay *v.* Mott, 43 Ga. 252; Crossman *v.* May, 68 Ind. 242; Williams *v.* Williams, 67 Mo. 661; Joslyn *v.* Collinson, 26 Ill. 61; Briggs *v.* Downing, 48 Iowa, 550; Clopton *v.* Hall, 51 Miss. 482; First Nat. Bank *v.* Cecil, 23 Oreg. 58 (31 P. 61; 32 P. 393); Rudolph *v.* Brewer, 96 Ala. 189 (11 So. 314).

[2] Moies *v* Bird, 11 Mass. 436 (6 Am. Dec. 179); Hawkes *v.* Phillips, 7 Gray, 284; Pauly *v.* Murray, 110 Cal. 13 (42 P. 313; Winders *v.* Sperry, 96 Cal. 194 (31 P. 6); McNaught *v.* McClaughry, 42 N. Y. 22 (1 Am. Rep. 487); Harrington *v.* Brown, 77 N. Y. 72; Steers *v.* Holmes, 79 Mich. 430 (44 N. W. 922). See Pratt *v.* Hedden, 121 Mass. 116.

between the *accommodating* and the *accommodated* parties, proof of the want of consideration would defeat the action. As between these parties, the accommodation paper is a valueless blank, and continues so, until it has been negotiated; when it becomes enforceable by the holder for value against all the prior parties, including the accommodation indorser or co-maker. And until it has been negotiated, the accommodation indorser may rescind his indorsement, and demand a surrender of the instrument or a cancellation of signature.[1]

The fact, that the holder for value knows that the instrument is accommodation paper as to one or more of the obligors, does not affect the liability of such accommodation obligors to such *bona fide* holder; for the money, which is paid out by the latter in negotiation of the paper, is sufficient consideration to bind all those who have already signed.[2]

The accommodation indorser is also bound to a pledgee of the accommodation paper, to the amount of the debt for which the paper has been pledged; certainly, where the

[1] French *v.* Bank of Columbia, 4 Cranch, 141; Martin *v.* Marshall, 60 Vt. 321 (13 A. 420); Comstock *v.* Hier, 73 N. Y. 269 (29 Am. Rep. 142); Macey *v.* Kendall, 33 Mo. 164; Clark *v.* Thayer, 105 Mass. 216 (7 Am. Rep. 511); Messmore *v.* Meyer, 57 N. J. Eq. 31 (27 A. 938); Stephens *v.* Monongahela Nat. Bank, 88 Pa. St. 157 (32 Am. Rep. 438); Martin *v.* Muncy, 40 La. Ann. 190 (3 So. 640); Devereaux *v.* Phillips' Estate, 97 Mich. 104 (56 N. W. 228); Berkeley *v.* Tinsley, 88 Va. 1001 (14 S. E. 842); Second Nat. Bank *v.* Howe, 40 Minn. 390 (42 N. W. 200); Pray *v.* Rhodes, 42 Minn. 93 (43 N. W. 838). There is no implied revocation of an accommodation indorsement, where the indorser dies before negotiation of the paper. Clark *v.* Thayer, 105 Mass. 216 (7 Am. Rep. 511).

[2] Israel *v.* Gale, 77 Fed. 532; 23 C. C. A. 274; Austin *v.* Boyd, 24 Pick. 64; Kayser *v.* Hodopp, 116 Ind. 428 (19 N. E. 297); Grant *v.* Ellicott, 7 Wend. 227; Nat. Bank of N. A. *v.* White, 19 App. Div. 390 (46 N. Y. S. 555); Brooks *v.* Hay, 23 Hun, 372; First Nat. Bk. *v.* Alton, 60 Conn. 402 (22 A. 1010); Seyfert *v.* Edison, 44 N. J. L. (16 Vroom) 393; Waite *v.* Kalmisky, 22 Ill. App. 382; First Nat. Bk. *v.* Adam, 138 Ill. 483 (28 N. E. 955); Holmes *v.* Bemis, 124 Ill. 453 (17 N. E. 42); Rea *v.* McDonald (Minn. '97), 71 N. W. 11; Weill *v.* Trosclair, 42 La. Ann. 171 (7 So. 232); Thatcher *v.* West River N. Bk., 19 Mich. 196; Philler *v.* Patterson, 168 Pa. St. 468 (32 A. 26); Norfolk N. Bk. *v.* Griffin, 107 N. C. 173 (11 S. E. 1049).

pledge is given for a contemporaneous loan.[1] But where the accommodation paper is pledged for an antecedent or existing debt, a fresh consideration is needed to bind the accommodation indorser, such as the surrender of the old note or of collateral security.[2]

§ 55. **Money consideration — Contemporary loans, future advances and existing debts** — The most common consideration of contracts in general, and of commercial paper in particular, is money. There can be no doubt as to the sufficiency of a money consideration, where the money is paid over simultaneously with the negotiation or delivery of the bill or note.[3] If the promise to pay in the future, to make future advances of goods or money, is a binding obligation, the note given or indorsed in consideration of this promise is supported by a consideration equal in amount to the advances, which the payee or indorsee has bound himself to make.[4] A common case of this kind is the deposit of a note or bill with a banker, to be discounted and drawn against. If the right to draw against it is made absolute, it is a sufficient consideration to make the bank or banker a holder for value.[5] But where the obligation to honor drafts against the amount of the note or bill is not absolute, the bank or banker is a holder for value; only to the amount of the drafts that had been honored, when

[1] Atlas Bank *v.* Doyle, 9 R. I. 76 (98 Am. Dec. 368; 11 Am. Rep. 219); Gordon *v.* Boppe, 55 N. Y. 665; Appleton *v.* Donaldson, 3 Pa. St. 386; Washington Bank *v.* Krum, 15 Iowa, 53; Buchanan *v.* International Bank, 78 Ill. 500.

[2] Depeau *v.* Waddington, 6 Whart. 220 (36 Am. Dec. 216); Smith *v.* Weston, 88 Hun, 25; Nat. Un. Bank *v.* Todd, 132 Pa. St. 312 (19 A. 218). But see *post*, § 56, for a full discussion of the sufficiency of the consideration in the pledge of commercial paper.

[3] Griswold *v.* Davis, 31 Vt. 390; Curtis *v.* Mohr, 18 Wis. 645.

[4] Marskey *v.* Turner, 81 Mich. 62 (45 N. W. 644) (note for an insurance premium); Smith *v.* Gillen, 52 Ark. 442; 12 S. W. 1073; (note for shares in a proposed mining corporation).

[5] Bank of New York *v.* Vanderhorst, 32 N. Y. 553; Platt *v.* Beebe, 57 N. Y. 339; Dymock *v.* Midland Nat. Bank, 67 Mo. App. 97; Benton *v.* Germ.-Am. Nat. Bk., 122 Mo. 332 (26 S. W. 975); U. S. Nat. Bk. *v.* McNair, 114 N. C. 335 (19 S. E. 361).

the question of *bona fide* ownership is raised and contested.[1]

In respect to the sufficiency of a consideration, where it consists of an existing debt; it seems to be well settled that the holder of a note or bill made or indorsed to him, in full and absolute payment or satisfaction of an existing debt,— whether it be the debt of the maker or drawer, or indorser, or the obligation of some third person, who is a total stranger to the commercial paper — can claim to be a holder for value. And where the existing debt is in the form of an existing note or bill, such note or bill must be surrendered or canceled. In every case where the right of action on the existing debt is absolutely surrendered, there can be no doubt that the new note or bill, given or indorsed in payment or renewal of the old note or bill or debt, is supported by a sufficient consideration, and makes the payee or indorsee a holder for value.[2] But if the note or bill is negotiated only as a conditional payment of the existing debt, and the creditor does not surrender his cause of action on the old debt, until it can be ascertained whether the instrument taken in payment is paid or not; it is held in some of the States, that the creditor is not a holder for value, and is not protected against the equitable defenses, from which the *bona fide* holder for value can

[1] Thompson *v.* Sioux Falls N. Bank, 150 U. S. 231; McBride *v.* Farmers' Bank, 26 N. Y. 450; Benton *v.* Germ.-Am. Nat. Bk., 122 Mo. 332 (26 S. W. 975); Shawmut Nat. Bank *v.* Manson (Mass. '97), 47 N. E. 196.

[2] Platt *v.* Beebe, 57 N. Y. 339; Mechanics' Bank *v.* Crow, 60 N. Y. 85; Cowing *v.* Altman, 71 N. Y. 435 (27 Am. Rep. 70); Mix *v.* National Bank, 91 Ill. 20 (33 Am. Rep. 44); Manning *v.* McClure, 36 Ill. 490; Bromley *v.* Hawley, 60 Vt. 46 (12 A. 220); Howard *v.* Hinckley, & E. Iron Co., 64 Me. 93; Wooley *v.* Cobb, 165 Mass. 503 (43 N. E. 497); Israel *v.* Gale, 77 Fed. 532; 23 C. C. A. 274; Swift *v.* Tyson, 16 Pet. 1; Taylor *v.* Clark (Tenn. Ch. App.), 35 S. W. 442; Gates *v.* Union Bank, 12 Heisk. 325; Hobson *v.* Hassett, 76 Cal. 203 (18 P. 320); Brown *v.* North, 21 Mo. 528; Langford *v.* Varner, 65 Mo. App. 370; Lundberg *v.* N. W. Elevator Co., 42 Minn. 37 (43 N. W. 685); McCabe *v.* Caner, 68 Mich. 182 (35 N. W. 901). The mere failure to surrender the original note does not invalidate the renewal. Murphy *v.* Carey, 89 Hun, 106; French *v.* French, 84 Iowa, 655 (51 N. W. 145). See *post*, Chapter XVII. On Payment.

claim exemption.[1] The negotiation or indorsement of a note or bill under those circumstances differs little, if any, from a pledge of the note or bill as a collateral security. Under what circumstances a pledge is held to be a holder for value, is explained in the next section.

§ 56. **When is a pledgee a bona fide holder for value.**— A bill or note may of course be the subject of a pledge, like any other kind of personal property. And the rights of the pledgee in the note, bill or other commercial paper, are the same as where the subject-matter of the pledge is corporeal.[2] In fact, the subject-matter of most pledges given in the transaction of the business is commercial paper. The only difficult question, to be met with in the consideration of the pledge of negotiable instruments, and the one which distinguishes them from all other kinds of pledges, is to what extent and when is a pledgee of a note or bill a *bona fide* holder. The claim of the pledgee to the character and protection of a *bona fide* holder depends upon the sufficiency of the consideration which supports the pledge. But he is a *bona fide* holder only to the amount of the debt for which the paper is pledged.[3] No authority is needed for the proposition that the pledgee is a *bona fide* holder, where he takes the note or bill as collateral security for a contemporaneous loan, or for future advances. The difficulty arises when the pledge is given for an existing debt. It is probably safe to say that the majority of the cases in this country require proof in such cases of a fresh consideration, in order to make the pledgee a holder for value; although there are some cases, which either deny the necessity of a fresh consideration, or claim the presence of such consideration where other cases would deny its existence.

[1] Phoenix Ins. Co. *v.* Church, 81 N. Y. 218 (37 Am. Rep. 494); Garner *v.* Coheny (Ga.), 24 S. E. 851; Bank of Commerce *v.* Wright (Ark. '97), 40 S. W. 81; Van Burkleo *v.* S. W. Mfg. Co. (Tex. '96), 39 S. W. 1085.

[2] See *post*, § , and Tiedeman on Sales, § 274.

[3] Yellowstone Nat. Bank *v.* Gagnon (Mont. '97), 48 P. 762.

All the cases seem to agree that there is a fresh consideration, sufficient to make the pledgee a *bona fide* holder for value, where, on receiving such pledge, other collateral security is surrendered;[1] or where the original debt is matured, and the pledgee expressly agrees to give an extension of time, whether he renews the original obligation or only promises to forbear to sue for a given time.[2] On the other hand, some of the cases maintain that the agreement for an extension of time must stipulate some definite period of extension; and that there is no fresh consideration, where the agreement not to sue is indefinite as to time; as, for example, where the creditor promises "to allow the loan to remain a little longer."[3]

To this proposition, however, other cases are opposed, holding not only that an indefinite extension of time is a sufficient consideration to make the pledgee a holder for value; but also that an agreement for an indefinite extension of time will be implied in every case of pledge, where it is given after maturity; on the ground, that the giving of a pledge under those circumstances cannot be rationally explained on any other hypothesis than that both parties anticipated an extension of the time of payment, or at least an indefinite forbearance to sue. These cases maintain, therefore, that in every case, where the pledge is given after maturity of the principal debt, there

[1] Mead *v.* Merchants' Bank, 25 N. Y. 143; Park Bank *v.* Watson, 42 N. Y. 490 (1 Am. Rep. 573); Dykman *v.* Northridge, 36 N. Y. S. 962; 1 App. Div. 26; Heath *v.* Silverthorn Mining Co., 39 Wis. 146; First National Bank *v.* Bentley, 27 Minn. 87 (6 N. W. 422); Mathias *v.* Kirsch, 87 Me. 9 (33 A. 19); Nichols & Sheppard Co. *v.* Dedrick, 61 Minn. 513 (63 N. W. 1110); Bank of Commerce *v.* Wright (Ark. '97), 40 S. W. 81.

[2] Swift *v.* Tyson, 16 Pet. 1; Goodman *v.* Simonds, 20 How. 243; Worcester Nat. Bank *v.* Cheney, 87 Ill. 602; Mix *v.* Nat. Bank of Bloomington, 91 Ill. 20; Paulette *v.* Brown, 40 Mo. 52; Bank of Commerce *v.* Wright (Ark. '97), 40 S. W. 81; Webster *v.* Bainbridge, 13 Hun, 180; Merchants and Farmers' Bank *v.* Wexson, 42 N. Y. 438; Atkinson *v.* Brooks, 26 Vt. 569; Holzworth *v.* Koch, 26 Ohio St. 33; Mathias *v.* Kirsch, 87 Me. 9 (33 A. 19).

[3] Atlantic Nat. Bank *v.* Franklin, 55 N. Y. 235; Oates *v.* National Bank, 100 U. S. 239; Lambert *v.* Clewly, 80 Me. 480 (15 A. 61).

is an implied agreement for an indefinite forbearance to sue the pledgor, which is a sufficient consideration to make the pledgee a holder for value.[1]

Where there is no express or implied agreement for forbearance, no surrender of other collaterals and no other specific consideration for the transfer of negotiable instruments as collaterals; it would seem, from the study of the general subject of consideration in the law of contracts, that the indorsee of such instruments cannot claim to be a holder for value. And such is the conclusion of many, if not the majority, of the cases.[2] On the other hand, there is eminent authority, including the Supreme Court of the United States, in support of the proposition that every pledge, given before or after maturity of the principal debt, is supported by a sufficient consideration to make the pledgee a holder for value; implied from the fact, that the possession of the collateral lulls the creditor into security and inactivity, and prompts him to show a leniency toward the debtor pledgor, which he would not otherwise manifest.[3]

Note. In Chapter X of the author's treatise on Commercial Paper, a very full discussion is to be found on the whole subject of consideration, as it bears upon the validity and

[1] Manning *v.* McClure, 36 Ill. 490; Worcester Nat. Bank *v.* Cheney, 87 Ill. 602; Thompson *v.* Gray, 63 Me. 228. But see *contra*, Moore *v.* Ryder, 65 N. Y. 438; Bowman *v.* Van Kuren, 29 Wis. 209 (19 Am. Rep. 554).

[2] Leslie *v.* Bassett, 129 N. Y. 523 (29 N. E. 834); Comstock *v.* Hier, 73 N. Y. 269 (29 Am. Rep. 142); U. S. Nat. Bk. *v.* Ewing, 131 N. Y. 560 (30 N. E. 501); Smith *v.* Hogeland, 78 Pa. St. 252; Union Nat. Bank *v.* Barber, 56 Iowa, 559 (9 N. W. 890); Turle *v.* Sargent, 63 Minn. 211 (65 N. W. 349); Goodman *v.* Simonds, 19 Mo. 106; Wagner *v.* Simmons, 61 Ala. 143.

[3] B. C. & N. R. R. Co. *v.* Nat. Bank of Republic, 102 U. S. 14; Doe *v.* N. W. Coal & Transp. Co., 78 Fed. 62; Stoddard *v.* Kimball, 6 Cush. 469; Roxborough *v.* Messick, 6 Ohio St. 448 (67 Am. Dec. 346); Straughan *v.* Fairchild, 80 Ind. 598; Kaiser *v.* U. S. Nat. Bank (Ga. '96), 25 S. E. 620; Buchanan *v.* Mechanics' Loan & Tr. Co., 84 Md. 430 (35 A. 1099); Maitland *v.* Citizens Nat. Bank, 40 Md. 540 (17 Am. Rep. 620); Rosemond *v.* Graham, 54 Minn. 323 (56 N. W. 38); Jones *v.* Wiesen (Neb. '97), 69 N. W. 762; Smith *v.* Wachob, 179 Pa. St. 260 (36 A. 221); Trigg *v.* Saxton (Tenn. Ch. App. '96), 37 S. W. 567.

characteristics of the various kinds of Commercial Paper. In this book, the fixed limitations of space have compelled the author to be satisfied with the presentation of those principles of the law of consideration, which apply exclusively in determining the existence or non-existence of *bona fide* ownership; presuming that the student has, in his course on Contracts, become conversant with the subject of consideration in general.

ILLUSTRATIVE CASES.

First Nat. Bank *v.* Cecil, 23 Oreg. 58 (32 P. 393).
Knowles *v.* Knowles, 128 Ill. 110 (21 N. E. 196).
Kelly *v.* Burrough, 102 N. Y. 93 (6 N. E. 109).
Spray *v.* Burke, 123 Ind. 565 (24 N. E. 588).

Forbearance to Sue, when Sufficient Consideration for Note.

First Nat. Bank *v.* Cecil, 23 Oreg. 58 (32 P. 393).

BEAN, J. This cause was originally submitted on briefs, without an oral argument, and, as the brief of appellant was confined largely to a discussion of the points passed upon in the opinion filed, the alleged error of the trial court in giving and refusing certain instructions, although assigned as error, and noted in the brief, escaped our attention, and was not considered. The contention for appellant is that, although an agreement by plaintiff to forbear instituting proceedings to set aside the conveyance from F. Cecil to defendant, and an actual forbearance by it, would be a good and sufficient consideration for the execution of the note by defendant, and that there was evidence from which the jury might find such an agreement, yet that question was not submitted to the jury, but the court instructed them, in effect, that mere forbearance by plaintiff, without an agreement to forbear, would be a sufficient consideration for defendant's promise. The defendant requested the court to charge the jury that "the mere forbearance of plaintiff, if you should find that there was such forbearance, to attack a conveyence of property from F. Cecil to the defendant, without any agreement to forbear on the part of the plaintiff, would not be a sufficient consideration to sustain the contract in question, even though the plaintiff did forbear to attack such conveyance on account of the defendant having signed the note in question." This was refused and the following given: "If you believe from the evidence that when the defendant signed the note sued upon he did so to induce the plaintiff not to attack the conveyance of property theretofore made by Frank Cecil to himself, then I charge you that there was

a good and sufficient consideration for his so signing." From the instruction refused and the one given it is apparent the theory of the trial court was that an agreement on the part of plaintiff to forbear to attack the conveyance from Frank Cecil to defendant was not necessary to support the defendant's promise, but, if the note was signed by defendant to induce plaintiff to so forbear, it was a sufficient consideration. This was manifest error. An agreement by a creditor to forbear prosecuting his claim, and an actual forbearance by him, is a good consideration to sustain a promise of a third person to pay the claim (Robinson *v.* Gould, 11 Cush. 55, and Bish. Cont., § 63); but a mere forbearance, without such a promise, is not. "A mere forbearance to sue," says Bigelow, J., "without any promise or agreement to that effect, by the holder of a note, forms no sufficient consideration for a guaranty. It is a mere omission on the part of the creditor to exercise his legal right, to which he is not bound by any promise, and which he may at any moment, and at his own pleasure enforce." Mecorney *v.* Stanley, 8 Cush. 87. And this is so although the act of forbearance was induced by the defendant's promise. Manter *v.* Churchill, 127 Mass. 31. An agreement to forbear may be inferred by the jury from the fact of forbearance and the circumstances under which it was exercised, and, as we have already held, there was sufficient evidence in this case to go to the jury on that question; but whether there was such an agreement on the part of the plaintiff, either express or implied, ought to have been submitted to the jury. It was argued for the plaintiff that the note itself imports a consideration, and, in the absence of any evidence on the part of the defendant showing a want of consideration, the plaintiff was entitled to a verdict, and the error of the court in instructing the jury did not prejudice the defendant. But, as the defendant did not partake in the original consideration of the note by becoming a party to it at its inception, the plaintiff, in order to recover against him, was bound to show a valid consideration for his promise; otherwise it was nondum pactum, and void. Without a new and independent consideration, the legal effect of his signing the note was that he became a party to an old note, which had long been made and delivered to the payee as a completed contract on a consideration wholly past and executed, and moving solely between the original makers and the plaintiff, and not to a new contract on a new and additional consideration as between the payee and himself. The words "for value received" gain no new or additional meaning by the defendant's signature, and import no other or further consideration than that which they signified when the note was given; and, without some proof of a new consideration, plaintiff cannot recover, because the complaint avers that the note was not signed by defendant until long after it was delivered to the plaintiff by the original promisors. Green *v.* Shepherd, 5 Allen, 589. It follows, therefore, that the judgment must be reversed, and a new trial ordered.

Want of Consideration, and Misrepresentation as a Defense to Note.

Knowles *v.* Knowles, 128 Ill. 110 (21 N. E. 196).

Bailey, J. This was a suit in assumpsit, brought by Hiram Knowles against Riley Knowles, to recover the amount of two promissory notes executed by the defendant to the plaintiff. Under proper pleadings, the defendant set up as a defense want of consideration, and also certain false representations, whereby he was induced to execute said notes; and a trial before the court, a jury being waived, resulted in a judgment in favor of the plaintiff for $669 70 and costs. This judgment was affirmed by the appellate court on appeal, and, the judges of that court having certified that the case involves questions of law of such importance, on account of collateral interests, that it should be passed upon by this court, the record has been brought here by a further appeal.

The plaintiff and defendant are brothers, and they, with their brother Prettyman Knowles, are the only surviving children of Marvel Knowles, a former resident of Gibson county, Ind., and who died at that place testate, July 31, 1883. In April, 1883, the defendant was indebted to his father in the sum of $2,716, evidenced by three promissory notes, two of which were secured by a mortgage on the defendant's land in Illinois. On the 24th day of that month the defendant's father surrendered and delivered said notes to the defendant, no part of them then being paid, and executed to him a release of said mortgage, and on the second day of May following the defendant executed, under his hand and seal, acknowledged and delivered to his father, an instrument in which, in consideration of the surrender to him of said notes, and the execution of said release, he, for himself and his heirs, forever relinquished, surrendered, and quitclaimed all his present and prospective interest, title, or claim to any part or portion of the personal or real estate of his father. The will of Marvel Knowles was executed September 9, 1881, which was prior to the execution by the defendant of said relinquishment of his interest in his father's estate. No change, however, was made in the will, and after the death of the testator it was duly probated in Gibson county, Ind. The will by its terms, after providing for the payment of the testator's debts and certain specific bequests, directed that the residue of his personal estate should be equally divided between his three sons; and also, after giving a certain tract of land to a granddaughter, devised the residue of his real estate in equal shares to his three sons, the shares of Riley and Prettyman to go to them and their heirs and assigns forever, and the share of Hiram to go to him during his natural life, and at his death to his children. The defendant testifies that, at the time of the execution of the instrument of May 2, 1883, he intended to relinquish his expectancy in his father's estate, but on examination of the will, after his father's death, he came to the con-

clusion that he was placed on the same footing with his brothers, and he thereupon made claim to one-third of the estate. After some discussion, his brothers executed to him a deed conveying, as was supposed, the undivided one-third of all the lands belonging to his father's estate,— said deed being executed, according to the recitals therein contained, in consideration of one dollar, "and to compromise and settle all differences and rights of action, and supposed rights of action, and matters in dispute, between the parties hereto." The evidence as to the negotiations which led to the execution of this deed is very confused and uncertain, leaving it altogether in doubt as to what controversies were in fact taken into consideration by the parties. It is not shown that the defendant at that time urged any claim beyond the right under the will to an undivided one-third interest in the lands. That he subsequently claimed the same interest in the personal estate may be fairly inferred from the evidence, although the amount of the personal estate, after the payment of debts and specific legacies, is not shown.

Some time after the execution of the deed last mentioned it was discovered that it did not correctly describe the lands intended to be conveyed, a certain quarter section being therein described as only a 40-acre tract, and negotiations were thereupon set on foot for the correction of the deed. The matter of such correction, as well as all other controversies with the defendant in relation to their father's estate, was placed by the defendant's brothers in the hands of their attorneys in Indiana, and the defendant was referred by his brothers to them. The defendant thereupon called upon said attorneys, and had an interview with them, which lasted from 4 o'clock in the afternoon to 3 o'clock the next morning. In that interview said attorneys insisted that the defendant was still liable to the estate for the amount of the note surrendered by his father, and that the same could be collected of him, with interest; and that, if he did not pay or account for the notes, he could not share in the distribution of his father's estate. The defendant, on the other hand, insisted that the notes were canceled, and that he was owing the estate nothing. As the result of the interview, said attorneys made a proposition, which the defendant accepted, that to settle the entire controversy the defendant should execute his promissory notes for two-thirds of the $2,700, one-half payable to each of his brothers; and thereupon the defendant executed his six promissory notes for $300 each, three payable to his brother Hiram, and three to his brother Prettyman. The notes in suit are two of the notes executed to Hiram. Soon afterwards, and in pursuance of the arrangement then made, the defendant reconveyed to his brothers the lands conveyed by the deed containing the erroneous description, and a new deed was executed to him, by which his brothers conveyed to him an undivided one-third of said lands by a correct description. That deed contained the following clause: "And it is further agreed by the grantors

herein that they, as heirs of Marvel Knowles, do hereby release the grantee, the said Riley Knowles, from all obligations and release which the said Riley Knowles incurred, and referred to in a certain release executed by him to said Marvel Knowles on the 2d day of May, 1883."

It is insisted by the defendant that in the settlement with said attorneys he was overreached and defrauded, and also that the notes then given, in the view of the previous settlement between the parties, were wholly without consideration. It will readily be seen from the foregoing statement that the questions thus raised are purely questions of fact, and, as all questions of that character have been conclusively settled adversely to the defendant by the judgment of the appellate court, there is nothing left for us to do but to adopt the conclusions of that court.

The only questions of law presented by the record are those which arise upon the written propositions which the defendant asked the circuit court to hold as the law in the decisions of the case. Nine such propositions were submitted on behalf of the defendant, the first five of which were marked "Held" by the court. Of the four propositions refused, the first and second are substantially embodied in those marked "Held." The third and fourth are simply to the effect that under the evidence the plaintiff was not entitled to recover. As the plaintiff made out his case by the production of the promissory notes sued on, and as the defenses urged were want of consideration, and misrepresentations by the plaintiff's attorneys, whereby the defendant was induced to execute the notes, the adoption of those propositions would have been tantamount to holding as a matter of law that said defenses, or one of them, had been conclusively established. The evidence, however, is by no means so clear and satisfactory as to necessitate the conclusions contended for, but was susceptible of constructions leading to conclusions adverse to the defenses interposed. The questions presented were therefore questions of fact, and not of law, and it would have been erroneous to hold as a matter of law that said defenses were proved. There being no error in the record, the judgment of the appellate court will be affirmed.

Accommodation Indorser when Liable to Holder.

Kelly *v.* Burrough, 102 N. Y. 93 (6 N. E. 109).

DANFORTH, J. The complaint states that on the thirteenth of November, 1881, one Evans made and executed his promissory note, payable four months after date to the order of the defendant for $600; that the defendant indorsed the note; that so indorsed, and before maturity, the note was transferred to the plaintiff for value. It alleges presentment for payment, protest and notice of non-payment, and that plaintiff is the owner of the note. The defendant answered, but denied none of the allega-

tions of the complaint. He set up, however, that his indorsement was without consideration, and for accommodation, and upon information and belief, that it had no legal validity binding upon him at all until at or about the time of its date, when it was discounted for and at the plaintiff's request at the Commercial Bank, and the proceeds paid to the plaintiff. For a second defense the defendant alleges that the note was paid.

Upon the trial the plaintiff put in evidence the note, signed by Evans as maker, indorsed first by the defendant, and second by the plaintiff. He computed the interest. It is obvious that upon the case as it then stood the plaintiff had made out his cause of action. The admissions in the pleadings, the possession of the note, the computation of interest, established the right to discover, and the amount due. But he also proved that the Commercial Bank had recovered a judgment against the maker and himself upon the same note; that he paid its amount to the bank, and had the judgment satisfied as to himself. It was proven, also, that the note was the property of the bank at the time suit was brought against Evans and Kelly. The defendant then testified that he indorsed the note at the request and for the accommodation of Evans, the maker, and returned it to him; that the plaintiff procured the note to be discounted, had the money placed to his own credit, and on the same day drew the money. The plaintiff then testified that he indorsed the note and procured it to be discounted at the request of the maker, and gave the proceeds to him. Other evidence was given to the same effect. The defendant's counsel asked to go to the jury upon the testimony. The plaintiff's counsel requested the court to direct a verdict in favor of the plaintiff. The court refused the defendant's request, and directed a verdict in favor of the plaintiff for the amount claimed. The defendant afterwards made a motion for a new trial, which was denied. From that order, and from judgment upon the verdict, an appeal was taken to the general term, where the judgment was affirmed. The defendant appeals from the judgment of affirmance to this court.

We think the appeal must fail. Conceding that both indorsers became so at the request and for the accommodation of the maker, the defendant was still liable, as first indorser, to the plaintiff as second indorser, and when the latter paid the amount of the note to the bank, and took it up, he became a holder for value, and entitled to indemnity from the defendant. Concerning the facts there was no dispute, and consequently no occasion to present them to the jury. The mere fact that the plaintiff, who testified to important particulars, was interested, was unimportant in view of the fact that there was no conflict in the evidence, or any thing or circumstance from which an inference against the fact testified to by him could be drawn. The cases cited by the appellant lack this element, while Lomer *v.* Meeker, 25 N. Y. 361, sustains the ruling of the trial court.

It is claimed, however, by the appellant, that the plaintiff was

improperly allowed to testify to the transaction between himself and Evans. Evans was dead, and the contention is put upon section 829 of the Code. I am unable to perceive that the defendant is of the class of persons protected by that section.

The other exceptions seem to have neither substantial nor technical merit. The defendant suffers from a relation to the note, which, at the request of Evans he voluntarily assumed, and not from any error of the court in enforcing his liability. We think the judgment should be affirmed.

When Void Note Cannot be Enforced by Bona Fide Holder.

Spray *v.* Burk, 123 Ind. 565 (24 N. E. 588).

Olds, J. This is an action upon a promissory note executed by the appellant to one George A. Carter for $175, and by Carter assigned to the appellee. The appellant answered in three paragraphs: (1) General denial; (2) no consideration; (3) that the note was executed for a gambling debt; that the said Carter won from the appellant the amount of the note in a game of cards, and the appellant executed the note for and in consideration of said sum so won at cards. The plaintiff, appellee, replied in two paragraphs: (1) A general denial; and (2) an estoppel; that he had no knowledge for what said note was given, and that before he purchased the same he informed the appellant that he was about to purchase the same, and appellant stated to him the note was all right, and that it was valid; that he would pay the same as soon as it would become due, and directed the appellee to purchase the same; and that appellee, relying on the statements of the appellant, and having no knowledge as to what the note was given for, or that it was given for an illegal consideration, he purchased the same for a valuable consideration. The cause was submitted to a jury and a trial had, resulting in a verdict for appellee for the amount of the note. Upon the trial of the cause it was admitted that the note was given for money won by Carter, the payee, from the appellant at a game of cards, which sum so won was all the consideration for said note, and that the note was illegal and void unless the appellant was estopped from setting up such defense to said note in the hands of the appellee. The appellee and his brothers testified to a conversation had between appellee and appellant before the appellee purchased the note. They testified that in such conversation the appellant told the appellant that the note was all right, and that he would pay it when due; that he thought the note was all right when he traded for it. They further testified as to what other conversation occurred; that appellee was owing the appellant a debt for a span of mules, and could not pay it then, and that appellee told the appellant that he could trade the mules for the note held by

Carter,— the note sued upon. They testified that this conversation occurred at the mill at Ewing.

The foregoing is in brief all of the testimony of said witness or witnesses in behalf of the appellee in support of his reply in estoppel. The appellant denied making any such statement to the appellee about the note in suit. The appellant and some five or more witnesses testified to at least two conversations between appellant and appellee other than the conversation testified to by appellee at the mill, in which appellant told appellee that the note was given for a gambling debt, and that he would not pay it, and that he should not purchase or trade for it, and if he did he would lose it. The appellant testified to the two conversations, and was corroborated by five witnesses. Some testified to being present at one of the conversations and some at the other. Other witnesses testified as to admissions of appellee, in which he stated that he knew before he purchased the note that it was given for a gambling debt, but that he thought he could make appellant take it in payment of the debt he owed the appellant for the mules, and that Carter said it was all right. The conversations testified to by appellant's witnesses were not disputed by the appellee, nor did he dispute any of the admissions that the witnesses testified as to his having made. From the evidence in the record, all that can be claimed for it is that it shows that at one time before the purchase of the note appellant told the appellee that the note was all right, and that he wou'd pay it when it became due. This, however, is disputed, and the undisputed evidence shows that upon two or more occasions before appellee purchased the note appellant told him what the note was given for, and that he would not pay it. By evidence undisputed it is shown that appellee knew all about what the note was given for at the time he traded for or purchased the note. Appellee himself does not testify to the contrary. It is true he says he thought it was all right, but his admissions, testified to and not denied by him, explain this expression, as he states that he knew the note was given for a gambling contract, but he thought it was all right; that he could make the appellant take it on the debt he was owing him for the mules. The appellee does not even state in his testimony that he relied upon the statement of the appellant, and was induced by such statement to purchase or trade for the note, nor does he deny that he knew the note was given for such gambling debt at the time he purchased it. The appellant filed a motion for a new trial, which was overruled, and he excepted, and judgment was rendered for appellee on the verdict. The sufficiency of the evidence to support the verdict is questioned by the motion for new trial. The question presented by the evidence as to whether or not a note given for a gambling debt is va'id and collectible in the hands of an assignee, who purchased the same with knowledge that the note was given for such debt, but after the maker has stated to him that the note is all right, and that he will pay it when due, but without it appearing that the pur-

chaser relied upon or was deceived by such statement of the maker. The note in suit in this case is not payable in any bank. By section 4950, Rev. St. 1881, the note is void, and the maker may defend against the note, and defeat a recovery in hands of an assignee, unless he is estopped under the facts in this case. The law is pretty well settled that, where a statute declares that a note given for a gambling debt shall be void, such note is invalid in the hands of a *bona fide* purchaser, even if such note is negotiable in its nature, and even if the maker has induced the assignee to purchase the same by representing to such assignee that the note is valid before he purchases the same, and he is thereby induced to purchase the same by reason of such representations of the maker. It is doubtful whether the maker is estopped from setting up his defense to the note. Sondheim *v.* Gilbert, 117 Ind. 71; 18 N. E. Rep. 687. The note in question in this case was void. It would constitute no consideration for a new promise. The appellee had full knowledge at the time he purchased the note that the note was given for a gambling debt; that the note was void; that there was no consideration for the promise of the maker to pay the note. With this knowledge he was not deceived. He could not have believed the note was valid and binding at the time he purchased it. He had no right to rely upon a promise of the maker to pay a debt which he knew was given for a gambling debt, and was without consideration, and he was bound to know that there was no consideration for the promise. The facts as shown by the evidence do not constitute an estoppel, even if in such a case as this a party can be estopped from defending against the note. There is no evidence to support the verdict, and the court erred in overruling the motion for new trial, and the judgment must be reversed. Judgment reversed, at costs of appellee, with instructions to the court below to sustain the motion for new trial, and for further proceedings in accordance with this opinion.

CHAPTER VI.

ACCEPTANCE AND AGREEMENTS TO ACCEPT BILLS, AND CERTIFICATION OF NOTES.

SECTION 57. The object and effect of acceptance.
58. When and in what cases must presentment for acceptance be made — Effect of failure.
59. Presentment by whom and to whom.
60. Where and at what time must presentment be made.
61. Form and manner of presentment.
62. When presentment is waived.
63. Who may accept.
64. Acceptance before and after completion of the bill.
65. Revocation of acceptance.
66. Acceptances when required to be in writing.
67. Form and phraseology of acceptance.
68. Implied acceptances — Detention or destruction of bill.
69. Agreements to accept.
70. Conditional acceptances.
71. Acceptances for honor or *supra protest*.
72. What acceptance admits.
73. Certified notes.

§ 57. **The object and effect of acceptance.** — The acceptance of a bill is an agreement made by the drawee, usually written across the face of the bill, that he will pay the full amount called for by the bill and according to its tenor, and subject to all the conditions and stipulations contained in the bill. Until the drawee has agreed, by such acceptance or an agreement to accept,[1] to honor the bill, he is under no obligation to pay it; nor can he be sued on it by the holder of the bill, even though he has in his hands, to the credit of the drawer, sufficient funds to cover the amount of the bill.[2]

[1] As to which see *post*, § 69.

[2] Schimmelpennich *v.* Bayard, 1 Pet. 264; Cox *v.* National Bank, 100 U. S. 704; Bullard *v.* Randall, 1 Gray, 605 (61 Am. Dec. 433); Carr *v.* Nat. Security Bank, 107 Mass. 45 (9 Am. Rep. 6); Tyler *v.* Gould, 48 N.

The only exception to this proposition is where the circumstances permit of the application of the principle, that a bill of exchange operates as an assignment of the fund against which it is drawn.[1]

Before acceptance, the drawee is so far considered a stranger to the bill, that he may acquire title to the unaccepted bill by indorsement, and sue the drawee on it; or transfer it to another, without incurring the liability of an acceptor.[2] Before acceptance, the drawer is the primary debtor; but acceptance makes the acceptor the primary debtor, and changes the obligation of the drawer into a secondary liability; that of an implied guaranty, that the bill will be paid by the acceptor, if it is presented for acceptance and payment, according to the tenor of the bill.[3] The drawer is also under obligation to reimburse the acceptor, if the drawee has accepted for accommodation of the drawer. Or, if the acceptor is indebted to the drawer, he debits the account of the drawer with the amount of the bill, when he pays the same.

§ 58. **When and in what cases must presentment for acceptance be made — Effect of failure.** — Bills, which are payable on a certain day in the future, *on demand* or on a given time *after date*, do not require formal presentment for acceptance. They need not be presented at all, until maturity, when they must be presented for payment.[4]

Y. 682; Smith *v.* Muncie Nat. Bank, 29 Ind. 158; Russell *v.* Phillips, 14 Q. B. 891; De Liquero *v.* Munson, 11 Heisk. 15; Clements *v.* Yeates, 69 Mo. 479.

[1] As to which, see *ante*, § 5.

[2] Attenborough *v.* McKenzie, 36 Eng. L. & Eq. 563; Swope *v.* Ross, 40 Pa. St. 186 (80 Am. Dec. 567); Desha *v.* Stewart, 6 Ala. 852.

[3] Hoffman *v.* Milwaukee Bk., 12 Wall. 181; Cox *v.* National Bank, 100 U. S. 704; Pomeroy *v.* Tanner, 70 N. Y. 547; Jarvis *v.* Wilson, 46 Conn. 90 (33 Am. Rep. 18); Marsh *v.* Low, 55 Ind. 271; Fuller *v.* Leonard, 27 La. Ann. 635; Turner *v.* Browder, 5 Bush, 216.

[4] Bank of Washington *v.* Triplett, 1 Pet. 25, Bachellor *v.* Priest, 12 Pick. 399; Plato *v.* Reynolds, 27 N. Y. 586; House *v.* Adams, 48 Pa. St. 261; Walker *v.* Stetson, 19 Ohio St. 400 (2 Am. Rep. 405); Sweet *v.* Swift, 65 Mich. 90 (31 N. W. 767); New York Iron Mine *v.* Citizens' Bk., 44 Mich. 344; 6 N. W. 823; (post-dated bill).

It is, however, customary in banking circles to present for acceptance, within a reasonable time, in these cases as well as in those in which the presentment is absolutely required. And where such a bill is received by an agent, a bank, for example, it is necessary to present in all cases.[1] But where bills are payable at sight, or a stated time after sight or demand; since in these cases the day of payment and maturity is dependent upon the ascertainment of a certain date of acceptance, they must be presented for acceptance with reasonable dispatch.[2]

Whenever it is the duty of the payee or holder of a bill to make presentment for acceptance, and he fails to do so within the prescribed time, and according to the requirements of the law, as explained in succeeding sections; he not only will lose his cause of action on the bill, but also every collateral claim against the drawer and prior indorsers.[3] If acceptance is refused, whether the presentment is made before or within the required time, the holder must at once protest it for non-acceptance, if the bill be of the kind required to be protested; and in any case, he must give prompt notice of dishonor to the drawer and prior indorsers, in order to hold them liable on their implied guaranty of the honor of the bill.[4]

§ 59. **Presentment by whom and to whom.**— The presentment for acceptance should be made by the rightful holder or by his duly authorized agent. But possession is

[1] Allen *v.* Suydam, 20 Wend. 321 (32 Am. Rep. 355).

[2] Cox *v.* National Bank, 100 U. S. 704; Prescott Bank *v.* Caverly, 7 Gray, 217 (66 Am. Dec. 473); Fernandez *v.* Lewis, 1 McCord, 321; Knott *v.* Venable, 42 Ala. 186; Craig *v.* Price, 23 Ark. 633; Phoenix Ins. Co. *v.* Allen, 11 Mich. 501 (83 Am. Dec. 756); Aymar *v.* Beers, 7 Cow. 705 (17 Am. Dec. 538); Lockwood *v.* Crawford, 18 Conn. 361. As to what is reasonable dispatch, see *post*, § 60.

[3] Smith *v.* Miller, 43 N. Y. 171 (3 Am. Rep. 690); *s. c.* 52 N. Y. 546; First Nat. Bank *v.* Fourth Nat. Bank, 77 N. Y. 320 (33 Am. Rep. 618); Adams *v.* Darby, 28 Mo. 162 (75 Am. Dec. 115).

[4] Bank of Washington *v.* Triplett, 1 Pet. 25; United States *v.* Barker, 4 Wash. C. C. 464; Lucas *v.* Ladew, 28 Mo. 342. As to requirements of protest and notice, see *post*, chapters XI, XII.

sufficient evidence of title, to enable an effective presentment to be made; and if the one having possession is not the true owner, such presentment will inure to the benefit of the latter, if it has been made in the form and manner required by law.[1]

The presentment must of course be made to the drawee, or to his duly authorized agent. If a bill is drawn on two or more persons, it should be presented to each one of the drawees; unless the drawees are partners, when presentment to one of them will be sufficient.[2]

Where the bill is drawn on two or more individual drawees, the holder is not obliged to take the acceptances of any number less than all; and if he does so, he releases the drawer and indorsers from liability, unless the bill was protested for non-acceptance as to those who had refused.[3]

In making presentment to a supposed agent, in the absence of the drawee, the value of the presentment will depend upon the express or implied authority of the agent to accept. And the burden of proof is on the holder to show, that the acceptance was made by a duly authorized agent.[4]

If the drawee is dead, there is some authority[5] for holding, that there should be a presentment to his personal representatives. But, inasmuch as the personal representatives have no authority in their representative capacity to accept, it would seem to be the better doctrine that the bill may be at once protested for non-acceptance, without

[1] Freeman *v.* Boynton, 7 Mass. 483; Bank of Utica *v.* Smith, 18 Johns. 230.

[2] Union Bank *v.* Willis, 8 Met. 504 (41 Am. Dec. 541); Holtz *v.* Bopple, 37 N. Y. 634; Gates *v.* Beecher, 60 N. Y. 518 (19 Am. Rep. 207; Fourth Nat. Bank *v.* Henschen, 52 Mo. 207; Mt. Pleasant Branch Bank *v.* McLaran, 26 Iowa, 306.

[3] Greenough *v.* Smead, 3 Ohio St. 416; Union Bank *v.* Willis, 8 Met. 504 (41 Am. Dec. 541). By statute, it is now provided in some States, that if one of two or more joint drawees refuses to accept, the bill need not be presented to the others, but may be at once protested as to all.

[4] Stainback *v.* Bank of Va., 11 Gratt. 260; Wiseman *v.* Chiappella, 23 How. 368; Sharpe *v.* Drew, 9 Ind. 281.

[5] Chitty and Story.

making such presentment. It is different, where the drawee is a firm, which has been dissolved by the death of one of the partners. In such cases, presentment should be made to the surviving partners, as they are the administrators of the partnership affairs.[1]

§ 60. **Where and at what time must presentment be made.**—The place of presentment for acceptance is determined altogether independently of the agreed place of payment; and it is always where the drawee lives or conducts his business.[2] There is some authority for the position that the holder may, according to his convenience, present the bill at the residence or place of business of the drawee;[3] but this would not appear to be a sound rule; especially in the light of the additional requirement, that presentment should be made during business hours. The business man cannot be expected to be at home during the business hours of the day, or have some one at his residence who is authorized to accept bills for him. The better rule would appear to be, that presentment must be made at the place of business, if the drawee has one, at least during business hours; and if he has no place of business, then at his residence.

If the residence or place of business of the drawee is unknown, or it has been changed, the holder must exercise reasonable diligence in discovering it. But if his reasonable inquiries fail to produce the desired information, he must then protest the bill for non-acceptance, stating his inability to find the drawee.[4]

If the bill is presented at the drawee's place of business, it should be presented during what are considered to be the

[1] Cayuga Co. Bank *v.* Hunt, 2 Hill, 635.

[2] Mason *v.* Franklin, 3 Johns. 202; Booth *v.* Franklin, 3 Johns. 207. But if the place of business or residence is unknown presentment at the place of payment is sufficient. Wolfe *v.* Jewett, 10 La. 390.

[3] Chitty, 316; Daniel, § 461.

[4] Freeman *v.* Boynton, 7 Mass. 483; Anderson *v.* Drake, 14 Johns. 114 (7 Am. Dec. 447); Ratcliffe *v.* Planters' Bank, 2 Sneed. 425; Wolfe *v.* Jewett, 10 La. 390; Hines *v.* Allely, 4 B. & Ad. 624.

ordinary business hours, by those engaged in that particular business in that particular place.[1] If the bill is presented at the drawee's residence, it may be presented at any time before the customary hour for retiring.[2]

But the observance of these requirements, as to time and place, is only of importance, where the drawee cannot be found; and it is necessary to determine whether a presentment for acceptance is made to an authorized agent, or whether due diligence has been exercised in making the presentment, resulting in failure. If the presentment is made to the drawee in person, it is a good presentment, it matters not where or at what hour it was made.

It has already been stated in a preceding section [3] that when presentment for acceptance is required to be made before maturity of the bill, it must be made within a reasonable time after negotiation of the bill by the drawer. What is a reasonable time is held to be a mixed question of law and fact; a question of law, where the facts are simple and undisputed, and a question of fact for the jury, where the case is attended by circumstances which render the question doubtful.[4]

The question is answered in the light of the facts of the particular case. It is probably true, that presentment for acceptance should be made within the customary twenty-four hours after the payee's receipt of it, if the payee retains the possession of it. At any rate, it is certain that the same delay, which is held to be permissible where the bill is indorsed or transferred to another, would in case of its retention by the payee be held to be unreasonable, and would discharge the drawers.[5] But bills of exchange are

[1] Cayuga Co. Bank *v.* Hunt, 2 Hill, 635; Nelson *v.* Fotterall, 7 Leigh, 179; Parker *v.* Gordon, 7 East, 385.

[2] Dana *v.* Sawyer, 22 Me. 244 (39 Am. Dec. 574).

[3] § 58.

[4] Prescott Bank *v.* Caverly, 7 Gray, 217 (66 Am. Dec. 473); Lockwood *v.* Crawford, 18 Conn. 361; Mohawk Bank *v.* Broderick, 10 Wend. 304; *s. c.* 13 Wend. 133 (27 Am. Dec. 192); Muncy School Board *v.* Com., 84 Pa. St. 464; Salisbury *v.* Renick, 44 Mo. 554; Walsh *v.* Dart, 23 Wis. 334.

[5] See Robinson *v.* Ames, 20 Johns. 146 (11 Am. Dec. 259); Gowan *v.*

not required to be presented for acceptance, before they are indorsed or transferred. They are intended to circulate as a substitute for currency, and to serve as a medium of exchange; and as long as the bill is not sent to some place outside of the ordinary channels of commerce, it may be passed from one person to another, and sent from place to place, until it reaches the place in which the drawee resides or does business. The payee is not obliged to send the bill directly to the place of business or domicile of the drawee.[1] But the bill cannot circulate indefinitely, without presentment for acceptance. The circulation only extends the time which will be considered reasonable. And here again, we find the question of reasonable time to be dependent upon the customs of trade, and the facts of each case.[2]

§ 61. **Presentment — Form and manner.**— No presentment for acceptance is sufficient, if the party making it has not at least the potential possession of the bill; and while it may be doubtful whether actual possession at the time of presentment may be necessary, it is certainly not necessary to exhibit it to the drawee, unless he demands an inspection of the bill.[3] But if the drawee demands the production of the bill, and is not satisfied with the "presenter's" verbal description of it; the presentment is not

Jackson, 20 Johns. 176; Nat. Newark Bkg. Co. *v.* Second Nat. Bk., 63 Pa. St. 404; Jordan *v.* Wheeler, 20 Tex. 698; Richardson *v.* Fenner, 10 La. Ann. 599; Phoenix Ins. Co. *v.* Allen, 11 Mich. 501 (83 Am. Dec. 756); Allan *v.* Eldred, 50 Wis. 132 (3 N. W. 565); Montelius *v.* Charles, 76 Ill. 303.

[1] Wallace *v.* Agry, 4 Mason, 336; Prescott Bank *v.* Caverly, 7 Gray, 217 (66 Am. Dec. 473); Montelius *v.* Charles, 76 Ill. 303; Lockwood *v.* Crawford, 18 Conn. 361; Shute *v.* Robins, 3 C & P. 80.

[2] See Prescott Bank *v.* Caverly, 7 Gray, 217 (66 Am. Dec. 473); National Newark Banking Co. *v.* Second Nat. Bk., 63 Pa. St. 404; Nichols *v.* Blackmore, 27 Tex. 586; Montelius *v.* Charles, 76 Ill. 303; Phoenix Ins. Co. *v.* Allen, 11 Mich. 501 (83 Am. Dec. 756); *s. c.* 13 Mich. 191; Walsh *v.* Dart, 23 Wis. 334; Elting *v.* Brinkerhoff, 2 Hall, 459; Olshausen *v.* Lewis, 1 Biss. 419. For a fuller citation of authorities and illustrations, see Tiedeman's Com. Paper, §§ 215, 216.

[3] Fisher *v.* Beckwith, 19 Vt. 31 (46 Am. Dec. 174). But see Fall River Union Bank *v.* Willard, 5 Met. 216, apparently *contra.*

good, unless the bill is exhibited for the drawee's examination. And the drawee has the right, if he demands it, to retain possession of the bill for twenty-four hours, before determining whether he will accept or refuse to do so.[1]

If the bill is executed in duplicate or triplicate, either part, but only one, need be presented; and only one part must be accepted or refused acceptance. The drawee will be liable to *bona fide* holders on all parts of the bill, on which he writes his acceptance.[2]

§ 62. **When presentment is waived.**— If the drawer directs the bill to be paid "without acceptance," or the bill contains in any other form a waiver of acceptance; in such cases, presentment need not be made to hold the drawer and indorsers liable.[3] So, also, is there an implied waiver of presentment for acceptance, and it may be dispensed with, where the drawer and drawee are the same person; whether he be a natural person, a partnership or a private corporation.[4]

Where the drawee is an infant, lunatic, married woman, or any other person under a legal disability, which makes him or her unable to make a valid contract by acceptance of the bill; the presentment may be dispensed with, and the

[1] Fall River Union Bank *v.* Willard, 5 Met. 216; Overman *v.* Hoboken City Bank, 30 N. J. L. (2 Vroom) 563; Connelly *v.* McKean, 64 Pa. St. 113; Case *v.* Burt, 15 Mich. 82; Andrews *v.* Germ. Nat. Bank, 9 Heisk. 211 (24 Am. Rep. 300). In many States, statutes expressly authorize the drawee to retain possession of the bill before giving his answer; usually, in accordance with the customary rules, as just stated.

[2] Downes *v.* Church, 13 Pet. 205; Bank of Pittsburg *v.* Neal, 22 How. 96; Walsh *v.* Blatchley, 6 Wis. 422 (70 Am. Dec. 469).

[3] Webb *v.* Mears, 9 Wright, 222; Miller *v.* Thompson, 3 M. & G. 576; Liggett *v.* Weed, 7 Kans. 273.

[4] Douglass *v.* Cowles, 5 Day, 511; Cunningham *v.* Wardwell, 12 Me. 466; Marion &c. R. R. Co. *v.* Hodge, 9 Ind. 163; Hasey *v.* White Pidgeon Co., 1 Dougl. 193; Western Min. Co. *v.* Toole (Ariz.), 11 P. 119; Capital &c. Ins. Co. *v.* Quinn, 73 Ala. 588 (on his firm). See *ante*, § 46. It is otherwise, where the instrument is a municipal warrant drawn by the officer of a municipal corporation or another. See Tiedeman Com. Paper, § 138.

bill protested for non-acceptance, as soon as the disability of the drawee is discovered.[1]

§ 63. **Who may accept.**— Except in cases of acceptances for honor or *supra protest*,[2] no one but the person, who is named in the bill as the drawee, can accept and be bound as an acceptor. A stranger to the bill cannot bind himself by an acceptance as an acceptor.[3] Where, however, the name of the drawee is not stated in the bill, one who accepts the bill will be presumed to be the intended drawee, and will be bound by his acceptance.[4]

A bill may be drawn on two persons in the alternative, when acceptance by one will be sufficient.[5] Where a bill is drawn on two or more drawees, jointly, they must all accept; and the acceptance of one is not sufficient, and the holder may protest for non-acceptance,[6] although the acceptance by one will be binding upon him, unless it is made conditionally, upon the acceptance of the bill by the others.[7]

But where the bill is drawn on a firm, an acceptance by a member of the firm will bind the firm if it comes within the scope of the firm's business; whether the acceptance is made in the firm's name, or in the individual name of the partner who accepts.[8]

An agent may, if duly authorized, accept a bill drawn on his principal. But the holder is not obliged to take such an acceptance; and may protest for non-acceptance, unless

[1] See Mellish *v.* Simeon, 2 H. Bl. 378; and *ante*, chapter IV.

[2] As to which, see *post*, § 71.

[3] Nichols *v.* Diamond, 9 Exch. 157; Fieder *v.* Marshall, 9 C. B. 606; Davis *v.* Clark, 6 Q. B. 16; Heenan *v.* Nash, 8 Minn. 407; May *v.* Kelly, 27 Ala. 497.

[4] Gray *v.* Milner, 8 Taunt. 739; *s. c.* 3 Moore, 91; Peto *v.* Reynolds, 9 Exch. 410; Wheeler *v.* Webster, 1 E. D. Smith, 1.

[5] See *ante*, § 13.

[6] See *ante*, § 59

[7] Owen *v.* Van Uster, 10 C. B. 316; Smith *v.* Milton, 133 Mass. 369.

[8] Lloyd *v.* Rowland, 2 B. & Ad. 23; Markham *v.* Hazen, 48 Ga. 570; Tolman *v.* Hanrahan, 44 Wis. 133; Gooding *v.* Underwood, 89 Mich. 187 (50 N. W. 818). Where, however, the bill is drawn on the individual partner, he cannot bind the firm by acceptance in the firm's name. Nichols *v.* Diamond, 9 Exch. 157.

he is supplied with undoubted proof of the authority of the agent to accept.[1]

§ 64. **Acceptance before and after completion of bill.**— The drawee ordinarily accepts on presentment by the holder, after the bill has been fully executed and delivered to the payee. But the acceptance may precede the completion and delivery of the bill; and the blank acceptance may be filled up by any one who lawfully gets possession of the bill.[2] And, as against a *bona fide* holder, the acceptor cannot set up any defense, growing out of wrongful negotiation or filling up of blanks.[3] The acceptance may also be made after maturity of the bill; but if the bill has not been protested, the acceptance after maturity will not bind any one but the acceptor, and give him no claim of indemnity against the drawee.[4] The holder may require the drawee to write the date of acceptance on the bill; particularly, where the bill is payable a given time after sight or demand, in order that the actual day may be ascertained without extraneous proof of the day of acceptance.[5] When, however, the acceptance bears no date, it is presumed to have been made within a reasonable time after its execution, and before maturity; but the actual date of acceptance may, in such cases, be proven by parol evidence.[6]

[1] Atwood *v.* Munnings, 7 B. & C. 278; 1 Man. & Ry. 78; First Nat. Bank *v.* Garside, 53 Ill. App. 454.

[2] Carter *v.* White, L. R. 25 Ch. D. 666; Credit Co. *v.* Howe Machine Co., 54 Conn. 357 (8 A. 472); Moiese *v.* Knapp, 30 Ga. 942; Hopps *v.* Savage, 69 Md. 513 (16 A. 133).

[3] Bank of Com. *v.* Carey, 2 Dana, 142; Moody *v.* Threlkeld, 13 Ga. 55; Redlick *v.* Doll, 54 N. Y. 234 (13 Am. Rep. 573); Montague *v.* Perkins, 22 L. J. C. P. 187; Young *v.* Ward, 21 Ill. 223.

[4] Exchange Bank of St. Louis *v.* Rice, 98 Mass. 288; Williams *v.* Winans, 13 N. J. L. (2 Green) 339; Spaulding *v.* Andrews, 48 Pa. St. 411; Bank of Louisville *v.* Ellery, 34 Barb. 630.

[5] Dufaur *v.* Oxenden, 1 M. & R. 90; Moore *v.* Willey, Buller N. P. 270. The practice to affix the date is so universal, that little opportunity has been given to courts to declare upon the right of the holder to demand it.

[6] Roberts *v.* Bethel, 22 L. J. C. P. 69; *s. c.* 12 C. B. 778; Kenner *v.* Creditors, 1 La. 121.

Where an acceptance is written on a blank or incomplete bill, and is based upon a valuable consideration ; the death of the drawee before its completion does not have any effect upon the liability of his estate on the acceptance; nor, on the other hand, does the death of the drawer, prior to acceptance, affect the drawee's liability on his subsequent acceptance.[1] But it seems, that the acceptor has no claim against the drawer, if he accepts after he has knowledge of the drawer's bankruptcy.[2]

§ 65. **Revocation of acceptance.**— As long as the bill has not been returned to the holder, the acceptance may be revoked and canceled by the drawee.[3] Although it has been held that an acceptance may be revoked after delivery, where there is time to make protest and to issue notices of dishonor ;[4] the general rule is that after delivery, the acceptance is irrevocable, unless all the parties, including the drawer and indorsers, consent to such revocation.[5] And where verbal acceptances are binding and legal, the acceptance is irrevocable, as soon as it has been communicated to the holder, even though the bill has not been returned to him.[6] In some States, it is provided by statute that acceptances are revocable, as long as the bill has not been transferred to a *bona fide* holder.[7]

§ 66. **Acceptances, when required to be in writing.**— Acceptances are generally written across the face of the bill ;

[1] Cutts *v.* Perkins, 12 Mass. 206; Debesse *v.* Napier, 1 McCord, 106 (10 Am. Dec. 658).

[2] Pinkerton *v.* Marshall, 2 H. Bl. 334; Wilkins *v.* Casey, 7 T. R. 711.

[3] Cox *v.* Troy, 5 B. & Ald. 474; Chapman *v.* Cottrel, 34 L. J. (N. S.) 186; Lindsay *v.* Price, 33 Tex. 280. The agreement to accept may also be revoked, before presentment for acceptance. Ilsley *v.* Jones, 12 Gray, 260; First Nat. Bank *v.* Clark, 61 Md. 400 (48 Am. Rep. 114).

[4] Irving Bank *v.* Wetherald, 36 N. Y. 335.

[5] Andressen *v.* First Nat. Bank, 1 McCrary, 252; 2 Fed. 122; North Atchison Bank *v.* Garretson, 51 Fed. 168; Phelps *v.* Borland, 103 N. Y. 406 (57 Am. Rep. 755; 9 N. E. 307); Trent Tile Co. *v.* Fort Dearborn N. Bank, 54 N. J. L. 33 (23 A. 423); Ft. Dearborn N. Bk. *v.* Carter, 152 Mass. 34 (25 N. E. 27).

[6] Grant *v.* Hunt, 1 C. B. 44.

[7] Notably, California.

and there can be very little doubt that the holder can refuse any other form of acceptance, and protest for non-acceptance. But it seems also equally well-settled, where statutes do not provide to the contrary, that if the holder is willing to take it, a verbal acceptance will bind the acceptor to all the parties of the bill.[1] In some States, it is held that the general provisions of the Statute of Frauds, which require contracts to be in writing, apply to commercial paper of every kind, and make a verbal acceptance invalid.[2] And, again, in very many of the States, it is now provided by statute, that acceptances must be in writing, and in some of them the acceptance is required to be written on the face of the bill, if the holder demands it.[3]

§ 67. **Form and phraseology of acceptance.** — The acceptance is customarily made by writing across the face of the bill the word "accepted"; and adding the signature of the acceptor and the date of acceptance. But, except where the local statute requires it, neither the signature of the acceptor[4] nor the date of acceptance is necessary; nor is it required that the acceptance be across the face of the

[1] Scudder *v.* Union Nat. Bank, 91 U. S. 406; Cook *v.* Baldwin, 120 Mass. 317 (21 Am. Rep. 517); Donavan *v.* Flynn, 118 Mass. 537; Arnold *v.* Sprague, 34 Vt. 402; Kelley *v.* Greenough, 9 Wash. 659 (38 P. 158); Williams *v.* Winans, 13 N. J. L. (2 Green) 339; Jarvis *v.* Wilson, 46 Conn. 90 (33 Am. Rep. 18); Mull *v.* Bricker, 76 Pa. St. 255; St. Louis Stockyards *v.* O'Reilly, 85 Ill. 546; Duncan *v.* Berlin, 60 N. Y. 151 (check); Sprague *v.* Hosmer, 82 N. Y. 466 (parol proof of acceptance, when it is a collateral fact); Miller *v.* Neihaus, 51 Ind. 401; Laflin R. R. Co. *v.* Nusheimer, 48 Md. 411 (30 Am. Rep. 472); Whilden *v.* Merchants &c. Bank, 64 Ala. 1 (38 Am. Rep. 1).

[2] See Plummer *v.* Lyman, 49 Me. 229; Wakefield *v.* Greenhood, 29 Cal. 597; Taylor *v.* Drake, 4 Strobh. 431 (53 Am. Dec. 680); Quin *v.* Hanford, 1 Hill, 82. For a fuller discussion of the cases, in which this question is mooted, see Tiedeman Com. Paper, § 222.

[3] For a statement of statutory provisions in the different States, see Tiedeman Com. Paper, § 222. See Weinhauser *v.* Morrison, 49 Hun, 498; Hall *v.* Cordell, 142 U. S. 116 (agreement to accept dispenses with a written acceptance); Hall *v.* Flanders, 83 Me. 242 (22 A. 158); Ulrich *v.* Hower, 156 Pa. St. 414 (27 A. 243); Moeser *v.* Schneider, 158 Pa. 412 (27 A. 1088); Heberle *v.* O'Day, 61 Mo. App. 390.

[4] In many States the local statutes do require the signature.

bill.[1] The acceptance may be written on a separate piece of paper, or in a letter.[2] Nor is the word "accepted" absolutely required. Any other word or phrase, which by reasonable intendment can be construed to show an intention to accept, will be sufficient;[3] and the signature of the drawee across the face of the bill will alone be a sufficient acceptance.[4] But where the words employed do not indicate the intention to accept, they will of course be held to be insufficient.[5] In every case, whatever words are used, they must be addressed to the payee or his agent.[6]

§ 68. **Implied acceptances — Detention or destruction of bill.**— The acceptance is held to be implied from any word or conduct of the drawee, which is consistent with the refusal of acceptance. There is, for example, an implied acceptance, where a bill is drawn for the accommodation of the drawee, and he has it discounted for his own benefit, promising payment at maturity.[7]

[1] Dufaur *v.* Oxenden, 1 M. & M. 90; Haines *v.* Nance, 52 Ill. App. 406; Philips *v.* Frost, 29 Me. 79; State Bank *v.* Wilkie, 35 Neb. 579 (53 N. W. 603).

[2] Germanic Nat. Bank *v.* Taaks, 31 Hun, 260; Central Sav. Bank *v.* Richards, 109 Mass. 413; Coffman *v.* Campbell, 87 Ill. 98 (telegram); Sturges *v.* Fourth Nat. Bank, 75 Ill. 595; Clarke *v.* Gordon, 3 Rich. 311; Garretson *v.* North Atchison Bank, 47 Fed. 867. In such cases, however, it will be an effective acceptance, only as to those who take the bill with notice, and on the strength of the acceptance. Worcester Bank *v.* Wells, 8 Met. 107.

[3] Barnet *v.* Smith, 30 N. H. 256 (64 Am. Dec. 290) (seen); Block *v.* Wilkinson, 42 Ark. 253 (payment guaranteed); Ward *v.* Allen, 2 Met. 53; 35 Am. Dec. 387 (I will pay the bill); Vanstrum *v.* Liljengren, 37 Minn. 195; 33 N. W. 555; (excepted); Cortelyon *v.* Maben, 22 Neb. 697; 36 N. W. 159 (do.).

[4] Wheeler *v.* Webster, 1 E. D. Smith, 1; Fowler *v.* Gate City N. Bank, 88 Ga. 29 (13 S. E. 831); Kaufman *v.* Barringer, 20 La. Ann. 419.

[5] Cook *v.* Baldwin, 120 Mass. 317; 21 Am. Rep. 517 (I take notice of the above); Rees *v.* Warwick, 2 B. & Ald. 113 (the bill shall have attention); First Nat. Bank *v.* Whitman, 94 U. S. 343 (crediting part payment on the bill); Shaver *v.* W. U. Tel. Co., 57 N. Y. 459 (agreement to pay if drawee remains in drawee's employ, and the order be not revoked); Martin *v.* Bacon, 2 Mills, 132 (I will be obliged to pay the bill).

[6] Martin *v.* Bacon, 2 Mills, 132.

[7] Bank of Rutland *v.* Woodruff, 34 Vt. 89.

It has also been held that, if the drawee does not return the bill within twenty-four hours after securing it, an acceptance will be implied, unless it is explained by accompanying circumstances; especially, where he has on the receipt of the bill employed language, from which an intention to accept may be implied.[1] In many States, this implication of an acceptance is now expressly provided by statute.[2] It is also held, and so provided by statute in some of the States, that an acceptance is to be implied from a willful destruction of the bill.[3]

§ 69. **Agreements to accept.**— There seems to be an unanimity of opinion on the part of the authorities, that where a payee or indorser, or other subsequent holder of a bill, takes it with notice of the drawee's executory agreement to accept; the bill will be treated as if it had been formally accepted, and the drawee is liable as an acceptor; and this, too, whether the bill, to which the agreement referred, is in existence when the promise to accept was made, or is executed subsequently.[4] But in order that the

[1] Hough *v.* Loring, 24 Pick. 254; Hall *v.* First Nat. Bk., 133 Ill. 234 (24 N. E. 546). But see *contra*, as to simple retention, Holbrook *v.* Payne, 151 Mass. 383 (24 N. E. 210); Koch *v.* Howell, 6 Watts & S. 350; Colorado Nat. Bank *v.* Boettcher, 5 Colo. 185 (40 Am. Rep. 142); and Hall *v.* Steele, 68 Ill. 231, where the detention was by special agreement between the parties.

[2] Matteson *v.* Moulton, 79 N. Y. 627 (there must be a demand for the return of the bill); Dickinson *v.* Marsh, 57 Mo. App. 566 (detention must be willful).

[3] Jeune *v.* Ward, 1 B. & Ald. 653; Rousch *v.* Duff, 35 Mo. 312; Dickinson *v.* Marsh, 57 Mo. App. 566.

[4] Savannah Nat. Bank *v.* Haskins, 101 Mass. 370 (3 Am. Rep. 373); Johnson *v.* Clark, 39 N. Y. 216; Woodard *v.* Griffiths &c. Com. Co., 43 Minn. 260 (45 N. W. 433); Gates *v.* Parker, 43 Me. 544; Nimocks *v.* Woody, 97 N. C. 1 (2 S. E. 249); In re Armstrong, 41 Fed. 381; Boyce *v.* Edwards, 4 Pet. 111; Crowell *v.* Van Bibler, 18 La. Ann. 637; Vallé *v.* Cerré, 36 Mo. 575 (88 Am. Dec. 161); Lugrue *v.* Woodruff, 28 Ga. 648; Steman *v.* Harrison, 42 Pa. St. 49 (82 Am. Dec. 491); Brown *v.* Ambler, 66 Md. 391 (7 A. 903); Pollock *v.* Helm, 54 Miss. 11 (28 Am. Rep. 342); Sherwin *v.* Bingham, 39 Ohio St. 137; Hall *v.* First Nat. Bank, 133 Ill. 234 (24 N. E. 546); Exchange Bank *v.* Hubbard, 62 Fed. 112; 10 C. C. A. 295. In some cases, it has been held that the agreement to accept will have the effect of an acceptance, although the holder did not know of

actual acceptance of a particular bill may be implied from a prior agreement to accept, it is held that the agreement must describe the bills to be accepted particularly enough, to enable one to ascertain from such description, whether the bill in question was intended to fall within the agreement.[1]

Where the bill is not yet executed, it is held that it must be executed and negotiated within a reasonable time, after the promise to accept has been given.[2] If the local statute does not require a writing, a verbal promise to accept will be binding on the drawee.[3]

§ 70. **Conditional acceptances.**— The holder of a bill may require an absolute and unconditional acceptance, free from all conditions, except those which have been inserted in the bill by the drawer. And he may protest the bill for non-acceptance, if a conditional acceptance is offered.[4] The holder may however take a conditional acceptance;

the agreement, when he took the bill. Jones *v.* Council Bluffs &c. Bk., 34 Ill. 313 (85 Am. Dec. 306); Read *v.* Marsh, 5 B. Mon. 10 (41 Am. Dec. 253); Wynne *v.* Raikes, 5 East, 514.

[1] Boyce *v.* Edwards, 4 Pet. 111; Maas *v.* Montgomery Iron Works, 88 Ala. 323 (6 So. 701); Carnegie *v.* Morrison, 2 Met. 381; Ilsley *v.* Jones, 12 Gray, 260; Franklin Bank *v.* Lynch, 52 Md. 279 (36 Am. Rep. 375); Atlanta Nat. Bank *v.* N. W. Fertilizing Co., 83 Ga. 356 (9 S. E. 671); Cassel *v.* Dows, 1 Blatch. 335; Palmer *v.* Rice, 36 Neb. 844 (55 N. W. 256); Naglee *v.* Lyman, 14 Cal. 451; Lindley *v.* First Nat. Bank, 76 Iowa, 629 (41 N. W. 381); Garretson *v.* North Atchison Bank, 47 Fed. 867; Am. Water Works *v.* Venner, 63 Hun, 632. And there are cases, which hold that a general description is sufficient, and that nicety or particularity of description is unnecessary. Barney *v.* Newcomb, 9 Cush. 46; Bank of Michigan *v.* Ely, 17 Wend. 508; Nelson *v.* First Bank, 48 Ill. 36 (95 Am. Dec. 510); Hall *v.* First Nat. Bank, 133 Ill. 234 (24 N. E. 546); Bissell *v.* Lewis, 4 Mich. 450.

[2] Coolidge *v.* Payson, 2 Wheat. 66; Boyce *v.* Edwards, 4 Pet. 111; First Nat. Bank *v.* Bensley, 2 Fed. 609.

[3] Townsley *v.* Sumrall, 2 Pet. 170; Scudder *v.* Union Nat. Bank, 91 U. S. 406; Spaulding *v.* Andrews, 48 Pa. St. 411; Light *v.* Powers, 13 Kan. 96; Hall *v.* Cordell, 142 U. S. 116. In many States, however, the promise is required by statute to be in writing. Blakiston *v.* Dudley, 5 Duer, 373; Nichols *v.* Commercial Bank, 55 Mo. App. 81; Brinkman *v.* Hunter, 72 Mo. 172 (39 Am. Rep. 492). See Hall *v.* Cordell, 142 U. S. 116.

[4] Shaver *v.* W. E. Tel. Co., 57 N. Y. 459; Ford *v.* Angelrodt, 37 Mo. 50 (88 Am. Dec. 174); Shackleford *v.* Hooker, 54 Miss. 716.

but, unless he procures the consent of the drawer and indorsers, they will be discharged from all liability on the bill.[1] Conditions may be attached to verbal acceptances, but they must be contemporaneous.[2] And if the acceptance be written, the condition must be in writing and cannot be proven by parol evidence.[3] It is not an uncommon occurrence for the drawee to add to his acceptance the provision, that the bill will be payable at a certain place, when the bill itself does not state any place of payment. In this country, it has been held very generally that such an addition to the obligation of the acceptor does not make it a conditional acceptance, so as to relieve the drawer and indorsers from liability, if the provision is not added, that the bill is payable nowhere else.[4]

Where a conditional acceptance is taken by the holder of a bill; in order to hold the drawer and indorsers liable, the burden is on such holder to show that these parties, or any one of them, had known of the condition, and had given his or their consent to this modification of the acceptance,[5] as well as to prove the performance of the condition.[6]

[1] Robinson *v.* Ames, 20 Johns. 146 (11 Am. Dec. 259); Wintermute *v.* Post, 23 N. J. L. (4 Zab.) 420; Vanstrum *v.* Liljengren, 37 Minn. 191 (33 N. W. 555); Taylor *v.* Newman, 77 Mo. 257; Savannah &c. Ry. Co. *v.* Schieffelin, 80 Ga. 576 (5 S. E. 781). But an exception to this rule is recognized, so far as the drawer is concerned, where the condition is, that the drawee has sufficient funds of the drawer to cover the amount of the bill. Robinson *v.* Ames, 20 Johns. 146 (11 Am. Dec. 259); Wallace *v.* Douglass, 21 S. E. 387; 116 N. C. 659.

[2] Wells *v.* Brigham, 6 Cush. 6 (52 Am. Dec. 570).

[3] United States *v.* Bank of Metropolis, 15 Pet. 377; Meyer *v.* Beardsley, 29 N. J. L. (1 Vroom) 236; Hunting *v.* Emmert, 55 Md. 265; Coffman *v.* Campbell, 87 Ill. 98; Foster *v.* Clifford, 44 Wis. 569 (28 Am. Rep. 603).

[4] Wallace *v.* McConnell, 13 Pet. 136; Cox *v.* National Bank, 100 U. S. 704; Troy City Bank *v.* Lauman, 19 N. Y. 477; Hills *v.* Place, 48 N. Y. 520 (8 Am. Rep. 568); Meyer *v.* Croix, App. Cas. 520; 25 Q. B. 343; Yeaton *v.* Berney, 62 Ill. 61; Myers *v.* Standart, 11 Ohio St. 29; Alden *v.* Barbour, 3 Ind. 414; Schoharie Co. Nat. Bk. *v.* Bevard, 51 Iowa, 257; Blair *v.* Bank of Tenn., 11 Humph. 83; Reeve *v.* Pack, 6 Mich. 240.

[5] Taylor *v.* Newman, 77 Mo. 257; Robinson *v.* Ames, 20 Johns. 146 (11 Am. Dec. 259). See Patton *v.* Winter, 1 Taunt. 422.

[6] Knox *v.* Keeside, 1 Miles, 294; First Nat. Bank *v.* Bensley, 2 Fed. 609; Cummings *v.* Hummer, 61 Ill. App. 393; Atkinson *v.* Manks, 1 Cow.

§ 71. **Acceptances for honor or supra protest.**— It has been stated in a preceding section [1] that, ordinarily, no one can become liable on a bill as an acceptor but the drawee. But when the drawee or drawees, named in the bill, have refused to accept, and the bill has been protested for non-acceptance, and the required notice given to the drawer and indorsers; it is held that any stranger may accept the bill for the honor of one or more of the parties, who are liable on the bill as drawer or indorsers. There can, however, be no acceptance by such a stranger, until there has been a presentment to the drawee and the bill has been protested for non-acceptance. This species of acceptance is, for that reason, often called an acceptance *supra protest.* The acceptance *supra protest* inures to the benefit of the party, for whose honor it has been made. And there can be as many acceptances *supra protest* by different persons, as there are parties to the bill, secondarily liable. But one person may accept for the honor of all the parties, or for any number more than one.[2] The holder is not required to take such an acceptance; but if he does, his cause of action against the persons, for whose honor the acceptance has been given, will be suspended, until the acceptor for honor has defaulted.[3] But the acceptance for honor is conditional. In order to hold such an acceptor liable, not only must there have been a previous presentment to the drawee and protest for non-acceptance; but on maturity of the bill, it must again be presented for payment to the drawee; and if he refuses, it must be protested for non-payment. When these conditions are complied with, the bill should be presented to the acceptor for honor. And if he dishonors the bill by refusal of payment, it must be again

691; Williams *v.* Gallyon (18 So. 162), 107 Ala. 439; Carson *v.* Kerr, 7 Kan. 243; Ford *v.* Angelrodt, 37 Mo. 50 (88 Am. Dec. 174); Savannah &c. Ry. Co. *v.* Schieffelin, 80 Ga. 576(5 S. E. 781).

[1] § 63.

[2] Konig *v.* Bayard, 1 Pet. 250; Schimmelpennich *v.* Bayard, 1 Pet. 264; Gazzam *v.* Armstrong, 3 Dana, 554; Davis *v.* Clark, 6 Q. B. 16; Walton *v.* Williams, 44 Ala. 347; Markham *v.* Hazen, 48 Ga. 570.

[3] Williams *v.* Germain, 7 B. & C. 468; Schofield *v.* Bayard, 3 Wend. 488.

protested for non-payment, in order to hold the parties liable, for whose honor the acceptance was given.[1] On the other hand, if the acceptor for honor pays the bill, he will have recourse only to those parties to the bill, for whose honor he accepts; and only when he has notified them, at the time of his acceptance, that he has accepted for their honor.[2]

Since the acceptance for honor is a conditional acceptance, no citation of authority is needed in support of the statement, that the holder of the bill is not obliged to take such an acceptance, but may proceed at once on the bill, against the drawer and indorsers.

§ 72. **What acceptance admits** — The acceptance is an absolute promise to pay the bill, which purports to have been drawn on him by the drawer. So that, while he does not, by acceptance, admit the genuineness of the body of the bill, so that he can defend a suit brought against him on his acceptance, by showing that there has been a material alteration in the terms or amount of the bill;[3] the acceptor does admit the genuineness of the signature of the drawer, and guarantees the authority of the agent of the drawer, where the bill has been drawn and signed by an agent.[4] The acceptor also admits as against the holder

[1] Hoare *v.* Cazenove, 16 East, 391; Baring *v.* Clark, 19 Pick. 220; Schofield *v.* Bayard, 3 Wend. 488; Wood *v.* Pugh, 7 Ohio, Pt. II., 156; Protalonga *v.* Larcs, 47 Cal. 378; Bacchus *v.* Richmond, 5 Yerg. 109.

[2] Cases cited, *supra.*

[3] Espy *v.* Bank of Cincinnati, 18 Wall. 604; White *v.* Continental Nat. Bank, 64 N. Y. 316 (21 Am. Rep. 612). But he is liable, if the negligence of the drawer in drawing the bill has enabled the holder to make a successful alteration. Van Duzer *v.* Howe, 21 N. Y. 531; Young *v.* Lehman, 63 Ala. 519.

[4] Hoffman *v.* Bank of Milwaukee, 12 Wall. 181; Hortsman *v.* Henshaw, 11 How. 177; Nat. Park Bk. *v.* Ninth Nat. Bk., 46 N. Y. 77 (7 Am Rep. 310); Ellis *v.* Ohio L. Ins. Co., 4 Ohio St. 628; Peoria &c. R. R. Co. *v.* Neill, 16 Ill. 269; Williams *v.* Drexel, 14 Md. 566. But it is held that, if an agent has without authority drawn a bill in the name of his principal, the acceptor may dispute his authority against the original payee, and any other but a *bona fide* holder. Agnel *v.* Ellis, 1 McGloin, 57.

of the bill, but not against the drawer,[1] that he has funds of the drawer sufficient to cover the bill, and that the drawer had a right to draw; [2] that the drawer had the legal capacity to draw the bill,[3] as well as the payee to indorse.[4]

But the acceptor does not admit the genuineness of the signature of the payee to his indorsement, even when the bill is payable to order of the drawer; nor the authority of the payee's alleged agent to indorse for him.[5]

These admissions are not generally inferred from an acceptance for honor.[6]

§ 73. **Certified notes.**— A promissory note is, of course, not susceptible of an ordinary acceptance. But there is a more or less general custom, where a note is payable at a particular bank, for such bank to write its name across such note; and such signature is taken as a certificate, that the maker has sufficient funds or credit to cover the note, and that the bank guarantees its payment.[7] The certification of checks is treated of in a subsequent chapter.[8]

[1] As to him only *prima facie*. Klopfer *v.* Levi, 33 Mo. App. 322.

[2] Raborg *v.* Peyton, 2 Wheat. 385; Hoffman *v.* Bank of Milwaukee, 12 Wall. 181; Jarvis *v.* Wilson, 46 Conn. 90 (33 Am. Rep. 18); Flournoy *v.* First Nat. Bk., 78 Ga. 222 (2 S. E. 547); Gillilan *v.* Meyers, 31 Ill. 525; Hall *v.* First Nat. Bk., 133 Ill. 234 (24 N. E. 546); Pomeroy *v.* Tanner, 70 N. Y. 547; Beardsley *v.* Cook, 89 Hun, 151; Vanstrum *v.* Liljengren, 37 Minn. 191 (33 N. W. 555); First Nat. Bk. *v.* Moss, 41 La. Ann. 227 (6 So. 25).

[3] Braithwaite *v.* Gardiner, 8 Q. B. 373; Aspinwall *v.* Wake, 10 Bing. 51; Agnel *v.* Ellis, 1 McGloin, 57.

[4] Smith *v.* Marsack, 6 C. B. 486; Peaslee *v.* Robins, 3 Met. 164. See *ante*, chapter IV.

[5] Hortsman *v.* Henshaw, 11 How. 177; Robinson *v.* Yarrow, 7 Taunt. 455; Holt *v.* Ross, 54 N. Y. 472 (13 Am. Rep. 615); White *v.* Continental Nat. Bank, 64 N. Y. 316 (21 Am. Rep. 612); Williams *v.* Drexel, 14 Ind. 566.

[6] Tiedeman Com. Paper, § 231.

[7] Mead *v.* Merchant's Bank, 25 N. Y. 143; Irving Bank *v.* Wetherall, 36 N. Y. 337. The latter case holds that the bank may, notwithstanding its certification of the note, become an indorsee and holder of such note against the maker and prior indorsers.

[8] See *post*, chapter XVI.

ILLUSTRATIVE CASES.

Montelius *v.* Charles, 76 Ill. 303.
Sweet *v.* Swift, 65 Mich. 90 (31 N. W. 767).
Huertematte *v.* Morris, 101 N. Y. 63 (4 N. E. 1).
Trent Tile Co. *v.* Ft. Dearborn Nat. Bank, 54 N. J. L. 33 (23 A. 423).

Bills Payable at Sight or a Certain Time after Sight Must be Presented for Acceptance within a Reasonable Time after Negotiation.

Montelius *v.* Charles, 76 Ill. 303.

Mr. Justice Scott. This action was upon an inland bill of exchange, in the name of a remote assignee, against the drawers. One important question is whether the holders had been guilty of such laches before presenting it to the drawee for payment, as would bar a recovery against the drawers.

Defendants were engaged in the banking business at Piper City, in this State. On the 8th day of September, 1873, on the application of James McBride, they drew their draft on the Franklin Bank of Chicago, payable at sight, to the order of John Strank, who then resided at Canton in Dakota. It was on the same day deposited in the post-office, directed to the payee at Canton, who received it after some delay, attributable alone to the fault of the mails. Having passed through the hands of several holders, it was presented on the 13th day of October, 1873, to the bank for payment, which, being refused, it was protested and notice given through the post office to the drawers and the several indorsers. In the meantime the Franklin Bank, on which the draft had been drawn, had failed and gone into bankruptcy.

The law is settled by an unbroken line of decisions that all drafts, whether foreign or inland bills, must be presented to the drawee within a reasonable time, and in case of non-payment notice must be given promptly to the drawer, to charge him. But what is a reasonable time under all the circumstances is sometimes a most difficult question. The general doctrine is each case must depend on its own peculiar facts, and be judged accordingly.

In Strong *v.* King, 35 Ill. 9, it was declared to be a general rule, the holder of a sight draft must put it in circulation or present it for payment, at farthest, on the next business day after its reception, if within the reach of the person on whom it is drawn. In the case at bar, the draft was put in circulation, and the point is made, the mere fact it was not presented for payment until after the lapse of thirty-five days, is *per se* such laches on the part of the holders as would discharge the drawers.

In Muilman *v.* D'Eguino, 2 H. Black. 565, Eyre, C. J., said: "Courts have been very cautious in fixing any time for an inland bill, payable at a certain period after sight, to be presented

for acceptance, and it seems to me more necessary to be cautious with respect to foreign bills payable in that manner. If, instead of drawing their foreign bills payable at usances in the old way, merchants choose, for their own convenience, to draw them in this manner and make the time commence when the holder pleases, I do not see how the courts can lay down any precise rule on the subject. I think, indeed, the holder is bound to present the bill in a reasonable time, in order that the period may commence from which the payment is to take place. The question what is a reasonable time, must depend on the peculiar circumstances of the case, and it must always be for the jury to determine whether laches is imputable to the plaintiff."

BULLER, J. "Due diligence is the only thing to be looked at, whether the bill be a foreign or an inland one, and whether it be payable at sight, at so many days after, or in any other manner. But here I must observe that I think a rule may thus far be laid down with regard to all bills payable at sight, or at a certain time after sight, namely, that they ought to be put in circulation. If they are circulated the parties are known to the world and their credit is looked to; and if a bill drawn at three days' sight were kept out in that way for a year, I cannot say there would be laches. But if, instead of putting it in circulation, the holder were to lock it up for any length of time, I should say he was guilty of laches."

Bills, both inland and foreign, having the quality of negotiability, are intended in some degree, to be used as a part of the circulation of the country, and are indispensable in the conduct of extended commercial transactions. They afford a safe and convenient mode of making payments of indebtedness between distant points. Banking houses that for a consideration, issue such bills, must be understood to do so in accordance with the known custom of the country — that they will be put in circulation for a limited period. If this were not so their value would be greatly depreciated, and their utility in commercial transactions would be destroyed. Were it understood the purchaser of such a bill was bound to make all possible dispatch to present it to the drawee or lose his recourse on the drawer, no prudent man would feel safe in taking one. He may know the drawer from whom he purchases the bill, and be willing to rely on his responsibility, but in many instances he has and can have no knowledge of the drawer's correspondent, the drawee. Commercial usage has, therefore, placed the responsibility upon the drawer, and he is presumed, in consideration of the premium paid, to assume all risks as to the solvency of the drawee for such reasonable time as the bill shall be kept in circulation. There can be no doubt, if the holder locks it up and keeps it out of circulation, he assumes all risks, and in case the bill is dishonored, his laches in that regard would bar a recovery against the drawer. Such bills are not issued with a view to be held as a permanent security, with a

continuing liability on the drawer. Illustrative of the law of this branch of the case, is Shute *v.* Robbins, 3 C. & P. 80.

The difficulty is to determine for what length of time such a bill may be kept in circulation, consistently with a continuing liability on the drawer. The rule adopted, as we have seen, is, it must be presented in a reasonable time under all the circumstances. But courts, not infrequently, experience great perplexity in making a distinction between a reasonable time for the presentation of such paper and laches on the part of the holder. Every case differs so essentially in its facts, it has given rise to many apparently contradictory decisions, but through all of them is noticeable the efforts of the courts to ascertain whether the bill was kept in circulation for only a reasonable period in the regular course of business. When that fact is once established the liability of the drawer is regarded as continuing. It will be found the decisions differ only in what the various courts deemed reasonable in each particular case.

In Robinson *v.* Ames, 20 Johns. 147, the bill declared on was drawn on the 6th of March, but not presented for payment to the drawees until the 20th of May. In the meantime the drawees had failed, but in a well-reasoned opinion the court came to the conclusion there was no such laches as would discharge the drawer.

In Jordon *v.* Wheeler, 20 Tex. 698, the bill in suit was put in circulation and indorsed by defendants without having been presented for acceptance before it came to the hands of the plaintiff; that a little more than a month elapsed before he presented it for payment, and that was declared to be according to usage.

In Nichols *v.* Blackmore, 27 Tex. 586, the court was of opinion a delay of forty-seven or forty-eight days was not such laches as would forfeit the right of the holder to recourse against the drawer in default of payment by the drawees.

Many other cases of the same import might be cited, but these are sufficient for our present purpose. They establish, beyond doubt, the fact, there is no fixed period in which the bill must be presented for payment, but that each case must be decided on its own peculiar facts in the light of commercial usage.

In the case at bar the bill was immediately put in circulation. It was mailed to the payee on the day it bore date, to his proper address in Dakota. Some delay occurred, attributable to interruption in the transmission of the mails, but this fact could not be imputed to the payee as laches. On the receipt, the payee immediately undertook and availed of the first opportunity to negotiate the bill. It was kept in circulation, and no delay was suffered other than that incident to the transaction of business in a sparsely populated territory like Dakota. The facts and circumstances proven show no laches on the part of any holder that would operate to discharge the drawers.

Aside from the presumption that will be indulged, the drawers must have known the bill was liable to be put in circulation for a

limited period. The evidence, though conflicting, warranted the court in finding the draft was sold with the knowledge that it was to be sent to the payee in Dakota. That being so, on every principle of justice, waiving all considerations of commercial usage, defendants ought to be held to have taken upon themselves the risk of the failure of the drawee for such reasonable time as it would take the bill to go there and be returned in the usual course of business, all things considered, and to be presented to the drawee at Chicago. We entertain no doubt their obligation is to this extent. It would be absurd to suppose it was within the contemplation of the drawers the bill was to be sent directly to the drawee at Chicago for payment. The law imposed no such duty upon the party procuring it. He could rightfully send it to his creditor and be guilty of no laches.

No error appearing in the record, the judgment will be affirmed.

Judgment affirmed.

No Acceptance of Bill Payable on Demand.

Sweet *v.* Swift, 65 Mich. 90 (31 N. W. 767).

Campbell, C. J. Plaintiff, who is a transferee not holding any better title than his assignor, sued defendant on two alleged acceptances. One A. E. Jackson, on March 1 and March 12, 1879, received from Matthias Kundinger two orders, payable to Jackson or bearer, for $35.14 and $16.12, addressed to Swift & Lockwood, a firm of which defendant was a member. They had an outstanding contract with Kundinger for the delivery of logs, which Kundinger had not performed. Jackson presented these orders, which were payable on demand, several times to Mr. Lockwood, who refused to honor them. In June, 1897, Swift & Lockwood dissolved, and Swift assumed the business and liabilities. On the 18th of December, 1897, Jackson induced one Norval Cameron, an agent of defendant, to write an acceptance upon them, with the understanding that they should only be payable if Kundinger had any credits at any time to cover them, which he never had. Jackson kept them for awhile, and Cameron would not pay them. He subsequently turned them over to Mr. Sweet, the plaintiff.

The plaintiff insisted below, and insists here, that he and his assignor, Mr. Jackson, were *bona fide* holders of this paper, and that the acceptance could not be affected by testimony of the circumstances and conditions under which it was given. The jury found for defendant. We have no doubt the verdict was warranted. These orders, which in form were bills of exchange payable to bearer on demand, were given to Jackson in the first place, and held by him until transferred to Sweet. They were not subject to acceptance, and a demand could only be made for payment. This could not be done indefinitely, and, when payment was refused, they ceased to be binding on the drawer as

negotiable paper, unless he was notified of the dishonor. No such notice was given, and the paper was thenceforth valueless in itself. Having ceased to bind Kundinger, if, by putting his name on as acceptor, defendant became a party at all under the law-merchant to paper calling for no acceptance, he became liable as the sole party liable, and his liability depended upon the consideration on which it was made. Jackson could not be a bona fide holder without notice of an obligation made to him directly, and upon negotiations carried on with him personally. The jury have found, under the charge, that the paper was not meant to be an absolute promise, and that, if it was, there was no consideration for it. This was fairly left to the jury. There was also no testimony tending to show that Cameron, who was defendant's general business agent, had any power to bind him to an accommodation promise, without any consideration. The case is one involving no legal difficulties, and there is no foundation for the contention that it is merely an attempt to change a written contract by parol. The question of consideration is entirely different from that, and the dealings were with Jackson himself, who was the promisee, if such an acceptance of dishonored paper not calling for acceptance, but only for payment, can be called a negotiable promise, which is a question we need not discuss.

The judgment must be affirmed, with costs.

The other justices concurred.

No Consideration Necessary Between Acceptor and Holder — False Representations by Drawer.

Huertematte *v.* Morris, 101 N. Y. 63 (4 N. E. 1).

RUGER, C. J. In the discussion of this case it is unnecessary to consider particularly the agency of Hourquet & Poylo in the transaction, as they acted solely as the gratuitous agents of the plaintiffs, and had no interest in the subject of the business. It may therefore be treated as a transaction occurring directly between the plaintiffs and Rau Runnels, and, concisely described, was to the following effect: The plaintiffs were merchants doing business at Panama, and one Christofel was a customer and debtor of theirs, residing at San Juan del Sur, near Rivas, in the State of Nicaragua. Christofel was desirous of discharging his obligations to the plaintiffs, but was embarrassed in doing so by the infrequency of communication between Rivas and Panama, and the want of a system of exchange enabling him to transmit funds safely and expeditiously from one place to the other. Under these circumstances, the plaintiffs consulted Hourquet & Poylo, a business firm at Panama, as to the best manner of collecting the debt. The plaintiffs were informed by Hourquet & Poylo that Rau Runnels was a correspondent of theirs residing at Rivas, and that the collection

could probably be made through him, and offered to transmit a draft on Christofel to Runnels for that purpose. Thereupon the plaintiffs made their draft on Christofel at 60 days for $1,000, payable to Hourquet & Poylo, who indorsed the same to Runnels, and forwarded it to him at Rivas for collection. In due time it was received by Runnels, and at its maturity was paid to him in Colombian currency.

It becomes important now to determine the legal obligations and duties of the parties toward each other at this stage of the transaction. In the collection of the draft, Runnels acted as the mere agent of the plaintiffs, and had no interest in the proceeds, except, perhaps, a lien thereon for the value of his services in making the collection. He had no right or authority to use such funds for his individual purposes, and his sole duty in relation to them was that of their transmission to his principals. The nature of the business impliedly authorized him to make such transmission according to the usages in trade, and, in the absence of such usages, to do so by some other method which should, in the exercise of reasonable care and prudence, promise to accomplish the object intended. It was therefore open to him to transmit the funds received in specie as they were collected; or he could have purchased a bill of exchange, if opportunity served, at at that place, and transmitted that; or he could remit them in any other way deemed most safe, convenient, and desirable to him, subject to the approval by his principles of the method adopted. It does not apper in the case but that Runnels was a merchant or banker, and accustomed to sell exchange upon foreign places. However that may be, he in fact sent to the plaintiffs, February 4, 1879, immediately upon collection, the proceeds thereof, less cost of collection and exchange on the draft in suit. This was his own draft upon the defendant, Morris, at New York, at 90 days' sight. Upon the receipt of this draft by the plaintiffs, it was accepted by them, and remitted to New York for presentation to and acceptance by the drawee, and the same was accepted by him February 26, 1879.

The sole question in the case is whether the plaintiffs were bona fide holders for value of the draft. We cannot doubt but that they were. If, on receiving the funds in question, Runnels had purchased with them a bill of exchange or draft from a merchant or banker, according to the usages of trade, and transmitted the same to the plaintiffs, no question could arise but that he acted as their agent in the transaction, and they would have been bona fide holders of such paper within all definitions of that character; and we are unable to see the difference in principle between such a case and the transaction in question. The funds collected by Runnels were, until they consented to their appropriation by him, at all times the property of the plaintiffs. Runnels' sole duty in relation to them was that of transmission to the plaintiffs, and until that duty was legally per-

formed he held them in a fiduciary capacity for a specified purpose. His duty of transmission could not be performed by remitting his own obligation, payable at a future day, except by the consent and approval of the plaintiffs. Until this consent and approval were given, the funds remained the property of the plaintiffs, and any use of them by Runnels before that time would have constituted a violation of his duty to his principals, which it cannot be presumed he committed.

Doubtless the lack of adequate facilities of exchange between Rivas and Panama induced Runnels to offer, and the plaintiffs to accept, the mode of remittance adopted; and it was entirely competent for Runnels to propose, and for the plaintiffs to accept, such a solution of the inconveniences of the situation; but no title to the funds collected passed to Runnels until the acceptance of the draft by the plaintiffs. After that, and not till then, he was entitled to use those funds as his own. By the original employment the plaintiffs contemplated no credit to Runnels, and he had no right to, and it does not appear that he even supposed he acquired any right to, use the funds in question for his own purposes, or that he ever did so use them. The conventional relation of debtor and creditor never existed between Runnels and the plaintiffs until the acceptance of his draft upon Morris, and then those relations were governed by the liabilities existing by force of the draft alone. In accordance with the rule which precludes a court from presuming a violation of duty by an individual, we must assume that Runnels performed his duty, and his whole duty, to the plaintiffs as their agent. This required him to safely keep their funds until he had transmitted them according to the usage of trade, or in some other mode approved by them. The legal effect of the method adopted was to transfer the title to the funds collected to Runnels simultaneously with the acceptance by the plaintiffs of Runnels' draft upon Morris, and was the precise equivalent of the payment of so much money in the immediate purchase of a draft or bill of exception by one person from another. We are therefore of the opinion that the plaintiffs were the bona fide holders for value of the draft in suit, and are entitled to recover thereon.

The general term conceded that the plaintiffs were *bona fide* holders, for value, of the bill before acceptance, but deny them that character after acceptance, as against the acceptor. We think the concession is fatal to the conclusion reached by that court. It is said that the Farmers' & Mechanics' Bank *v.* Empire Stone Dressing Co., 5 Bosw. 290, is authority for the position. It is true that some expressions of the learned judge writing in that case may justify the citation, yet it should be considered that those remarks were unnecessary to the decision of the case; and the same court have twice since then refused to follow it. We conceive the rule there laid down finds no support in the doctrines of the text-writers or the reported cases. Philbrick *v.* Dallett, 2 Jones & S. 370; First Nat. Bank of Portland *v.* Schuyler, 7 Jones & S.

440; Pars. Bills & Notes, 323; Daniels, § 534; Edw. Bills (2d Ed.), 410.

If a party becomes a bona fide holder for value of a bill before its acceptance, it is not essential to his right to enforce it against a subsequent acceptor that an additional consideration should proceed from him to the drawee. The bill itself implies a representation by the drawer that the drawee is already in receipt of funds to pay, and his contract is that the drawee shall accept and pay according to the terms of the draft. 1 Pars. Bills & Notes, 323, 544; Arpin *v.* Chapin (Mass.), 3 N. E. Rep. 25. The drawee can, of course, upon presentment, refuse to accept a bill, and in that event the only recourse of the holder is against the prior parties thereto; but in case the drawee does accept such a bill, he becomes primarily liable for its payment, not only to its indorsers, but also to the drawer himself. The delivery of a bill or check by one person to another, for value, implies a representation on the part of the drawer that the drawee is in funds for its payment, and his subsequent acceptance of such check or bill constitutes an admission of the truth of the representation which he is not allowed to retract. Daniels Neg. Inst. 534; Pars. Bills & Notes, 323, 544, 545. By such acceptance the drawer admits the truth of the representation, and having obtained a suspension of the holder's remedies against the drawer, and an extension of credit by his admission, is not afterwards at liberty to controvert the fact as against a *bona fide* holder for value of the bill. The payment to the drawer of the purchase price furnishes a good consideration for the acceptance which he then undertakes shall be made, and its subsequent performance by the drawee is only the fulfillment of the contract which the drawer impliedly represents that he is authorized by the drawee to make. The rule that it is not competent for an acceptor to allege as a defense to an action on a bill that it was done without consideration, or for accommodation, as against a bona fide holder for value of such paper, flows logically from the conclusive force given to his admission of funds, and is elementary. Daniels Neg. Inst., §§ 532–534; Edw. Bills, 410; Harper *v.* Worrall, 69 N. Y. 371; Commercial Bank of Lake Erie *v.* Norton, 1 Hill, 501; Robinson *v.* Reynolds, 2 Q. B. 211; Hoffman *v.* Bank of Milwaukee, 12 Wall. 181. Of course, the cases determined upon the ground that the holder of such paper received it to apply upon an antecedent debt, or that it had been unlawfully diverted from the purpose for which it was designed, have no application to the circumstances of this case.

The judgments of the courts below must therefore be reversed, and a new trial ordered, with costs to abide the result.

All concur, except Miller, J., absent.

Acceptance Once Delivered, Irrevocable, Except when Procured by Fraud.

Trent Tile Co. *v.* Ft. Dearborn Nat. Bank of Chicago, 54 N. J. L. 33 (23 A. 423).

Error to circuit court, Mercer county; before Justice Scudder.

Action by the Ft. Dearborn National Bank of Chicago against the Trent Tile Company on a bill of exchange. Judgment for plaintiff. Defendant appeals. Affirmed.

The other facts fully appear in the following statement by napp, J.:—

Riley drew a bill of exchange on the Trent Tile Company, the plaintiff in error, for $850, dated at Chicago, November 7, 1888, payable to the order of the defendant in error. The defendant in error forwarded the bill to the Mechanics' National Bank of Trenton for presentation and collection. The bank presented the bill to the drawee on the 12th of November, and its acceptance, payable at the Mechanics' Bank, was indorsed on the bill by drawee's treasurer, and by him redelivered to the bank. Thereafter, and on the same day, the treasurer of the tile company learned that Riley had failed on the 10th of November. On the next day — 13th — the treasurer applied to the cashier of the Mechanics' Bank for leave to revoke the acceptance, and to erase the indorsement and signature. This the cashier declined to permit, and notice thereupon was given the bank to refuse payment of the bill. At the time of the acceptance the drawer had no funds in the hands of the tile company, and was indebted to it. Under the facts set forth the circuit court of Mercer county ordered judgment for the plaintiff below for the amount of the bill and interest. The present writ of error is to review this judgment.

Argued June term, 1891, before the Chief Justice, and Van Syckel, Knapp, and Garrison, JJ.

Knapp, J. (*after stating the facts*). The main question raised and discussed in this case is whether the drawee of a bill of exchange can, after an indorsement of acceptance and redelivery of the acceptance to the agent of the holder, on discovering the insolvency of the drawer, revoke such acceptance, the drawee having no funds of the drawer in his hands. The general rule is that an acceptance delivered to the holder is irrevocable, and this is so whether the acceptance is on account of funds of the drawer of the bill in the hands of the acceptor, or for the accommodation of earlier parties to the bill. Citation of authorities for the proposition of law would be superfluous. The approved writers on the law of commercial paper and the adjudged cases are as one on this subject. Rand Com. Paper, pars. 216, 637. In commercial law, such an engagement, completed by delivery, can be discharged only by payment of the bill, release of the acceptance, or its waiver. An acceptance delivered to the agent of the holder duly authorized to receive it, is, in legal effect, and for all purposes,

delivery to the holder. When the bill bearing the signature of the acceptor by his act or direction comes into the hands of such agent, the contract becomes *eo instante* a completed one between the acceptor and the principal owner of the bill. A bill of exchange forwarded to or delivered into the hands of a bank or banking-house for the purpose of presentation to the person upon whom the bill is drawn for his acceptance in the usual course of business is a transaction that creates the relation of principal and agent between such holder and the bank, with authority in such agent to receive in the holder's behalf delivery of the acceptance when signed. The Mechanics' National Bank of Trenton was therefore the agent of the plaintiff to procure in the plaintiff's name acceptance of the bill in question. The bill was presented to the defendant in due course, and regularly accepted by its authorized officer, and delivered to such agent of the plaintiff. There would thus appear a finished transaction of legally binding force, vesting rights in the plaintiff which would not thereafter be divested without its consent. The defendant, however, claims that it had the right to, and did, revoke its act of acceptance. The contention is grounded upon the authority of the well-known case of Cox *v.* Troy, 5 Barn. & Ald. 474, referred to by all the text-writers on negotiable instruments since its decision. This case holds that, "where a defendant, [drawee], having once written his acceptance with the intention of accepting a bill, afterwards changes his mind, and before it is communicated to the holder, or the bill delivered back to him, obliterates his acceptance, he is not bound as an acceptor. The propositions seemed so plainly just that the justices who decided the case said that the rule rested upon principles of common sense. The case was simply this: A bill was handed to the drawee for his acceptance. Within the time allowed him for decision he had written his name upon the bill; then, on reflection, decided not to accept it, erased his name, and handed it back to the party who had delivered it to him. Prior to this decision there were no *dicta* to be found of eminent English jurists tending to the doctrine that the mere act of signing in secret as an acceptor of a bill bound the party so signing to the obligation of a completed contract; and in Thornton *v.* Dick, 4 Esp. 270, it seems to have been so decided. But this doctrine was ignored in Cox *v.* Troy, where the elemental principle was applied that the secret act of a party could ripen into a binding contract only upon the intentional promulgation of such act by delivery or its equivalent. The transaction was in no true sense a revocation. It was a refusal to accept the draft. See, also, Bank of Van Diemen's Land *v.* Bank of Victoria, L. R. 3 P. C. 526. But it is not apparent how the defendant can profit by anything decided in the case of Cox *v.* Troy. It is no authority for the asserted right to revoke its act after delivery to the agent of the plaintiff. For such a right neither *dictum* nor authority has been found in any reported case determined upon principles of the common law. The case of Burrows *v.* Jemino,

2 Strange, 733, is cited as a case in point for the plaintiff in error. The point decided was that a man could not be sued in England on his acceptance of a bill of exchange abroad after he had been discharged from liability by the laws of the foreign jurisdiction. The custom referred to in the brief of counsel, and which received the consideration of the court in that case, was not the custom of merchants in England, but the law as it existed in Leghorn, where the contract of acceptance arose. There, if the drawer failed, and the acceptor had not sufficient assets of the drawer in his hands at the time of the acceptance, the acceptance was void. But here, in the absence of fraud on the part of the plaintiff, which, it may be said, is feebly asserted, and in no degree sustained, the insolvency of the drawer, or the want of funds with the drawee, is no answer to his claim as a bona fide holder of the bill. The judgment below was in accordance with the foregoing views, and should be affirmed.

CHAPTER VII.

THE TRANSFER OF BILLS AND NOTES BY DELIVERY AND IN GENERAL.

SECTION 74. The assignability of *choses in action* in general — Non-negotiable paper.
75. Transfer of negotiable bills and notes payable to bearer.
76. Liability of assignors of bills and notes payable to bearer.
77. Liability of broker in transfer of paper by delivery.
78. Transfer by delivery of paper payable to order.
79. Sale of bill or note without delivery.
80. Implied transfer of bills and notes.
81. Transfer by legal process — Attachment, garnishment, execution.
82. Transfer *donatio mortis causa*.

§ 74. **The assignability of choses in action in general — Non-negotiable paper.**— It is a well-known rule of the common law that *choses in action* cannot be assigned, so as to enable the assignee to maintain an action upon it; and this is still the rule in the English-speaking world, where it has not been changed by statute.[1] At a very early day, the English Court of Chancery recognized the public demand for the assignment of at least certain executory contracts; and held such assignment to be valid, authorizing the assignee to compel the assignor to sue on the contract in his name. The courts of law ultimately recognized the validity of the assignment, so far as

[1] Lord Coke tells us, in Lampet's Case, 10 Rep. 48: "The great wisdom and policy of the sages and founders of our law have provided that no possibility, title, right, nor thing in action shall be granted or assigned to strangers, for that would be the occasion of multiplying of contentions and suits, of great oppression of the people, and chiefly of terre-tenants, and the subversion of the due and equal execution of justice." See also Hay *v.* Green, 12 Cush. 282; Boston Ice Co. *v.* Potter, 123 Mass. 28 (29 Am. Rep. 9); Greenby *v.* Wilcocks, 2 Johns. (3 Am. Dec. 379); and general works on Contracts, such as Anson, Bishop or Lawson.

to permit the assignee to bring suit on the contract in the name of the assignor.[1] In very many of the States, now, this common law rule has been completely abrogated by statute, so that the assignee of any contract,— with the exception of a few contracts of a personal character, which need not be referred to in this connection — may sue in his own name.

But, prior to these modifications of the common law rule by Chancery, and by modern statutes, and certainly independently of them; a custom grew up among merchants, which was recognized by the common law courts as valid and binding, to recognize the right of the payee of bills of exchange and promissory notes to transfer the full legal title to the same. But in order that such assignee may acquire the full legal title, the bill or note had to contain all the required elements of negotiable paper, as they have been explained in chapter II. If a paper was non-negotiable, even though it had in many respects the form and characteristics of a negotiable bill or note, the common law rule applied, and the assignee could only bring suit in the name of the assignor.[2]

Another important difference between negotiable and non-negotiable paper is, that the latter is transferred subject to all the defenses that may be set up against the original payee; whereas, in the transfer of a negotiable instrument to a *bona fide* holder, the latter takes it free from equitable defenses, *i. e.*, those which do not question the *prima facie* validity, and which do not appear on the face of the paper.[3]

[1] Story *v.* Livingston, 13 Pet. 359; Fay *v.* Gaynon, 131 Mass. 31; McWilliams *v.* Webb, 32 Iowa, 577; and Anson, Bishop, or Lawson on Contracts.

[2] Costello *v.* Crowell, 127 Mass. 293 (34 Am. Rep. 367); Backus *v.* Danforth, 10 Conn. 297; Prescott *v.* Hull, 17 Johns. 284; Johnston *v.* Speer, 92 Pa. St. 227 (37 Am. Rep. 675); Weidler *v.* Kauffman, 14 Ohio, 455; Hughes *v.* Frum, 41 W. Va. 445 (23 S. E. 604).

[3] See *post*, chapter IX, on Bona Fide Holders as to the defenses which may be set up against them. See, also, as to non-negotiable paper, Cowthey *v.* Vandenburgh, 101 U. S. 572; Bradford *v.* Williams, 91 N. C. 7; Dyer *v.* Homer, 22 Pick. 253; Haskell *v.* Brown, 65 Ill. 29; Hunter *v.*

The mode of assignment of non-negotiable instruments differs in no respect from that of any other contract. Although some sort of written assignment is customarily employed, written either on the instrument itself or on a separate piece of paper; a verbal assignment with a delivery of the instrument is equally effective to pass the title; an equitable title, where the common law prohibition of assignment of *choses in action* still prevails; and a legal title, where it has been abrogated by statute.[1]

§ 75. **Transfer of negotiable bills and notes payable to bearer.**— It was at one time thought that, in order that a bill or note may be *negotiable*, it had to be made payable to the *payee or his order*, or *to the order of* the payee. But it has long been definitely established by the decisions, that a note or bill, payable *to bearer*, or to *A*. (the payee) *or bearer*, was negotiable in the fullest sense of the term.[2] But negotiable bills or notes, which are payable to bearer, may be transferred by delivery; and the legal title to the same passes without any written transfer or indorsement.[3] And this is likewise the case, where a bill or note, originally payable to order, is made payable to bearer by a prior indorsement in blank.[4]

Henninger, 93 Pa. St. 373; Wetter *v.* Kiley, 95 Pa. St. 461; Cohen *v.* Prater, 55 Ga. 203; Sharts *v.* Awalt, 73 Ind. 304.

[1] See Hill *v.* Alexander, 2 Kan. App. 151.

[2] Walnut *v.* Wade, 103 U. S. 683; Eddy *v.* Bond, 19 Me. 461 (36 Am. Dec. 767); Truesdell *v.* Thompson, 12 Met. 565; Dean *v.* Hall, 17 Wend. 214; Hutchings *v.* Low, 1 Green (N. J. L.), 246; Carr *v.* LeFevre, 27 Pa. St. 413; Hathcock *v.* Owen, 44 Miss. 799; Smith *v.* Rawson, 61 Ga. 208; Avery *v.* Latimer, 14 Ohio, 542; Woodruff *v.* King, 47 Wis. 261 (2 N. W. 452); Johnson *v.* Mitchell, 50 Tex. 212 (32 Am. Rep. 602).

[3] Holcomb *v.* Beach, 112 Mass. 450; Walnut *v.* Wade, 103 U. S. 683; Lyle *v.* Burke, 40 Mich. 499; Hall *v.* Allen, 37 Ind. 541; Coco *v.* Gumbel, 47 La. Ann. 966; Woodruff *v.* King, 47 Wis. 261 (2 N. W. 452); Lamb *v.* Matthews, 41 Vt. 42. But see, *contra*, by statute, requiring indorsement, Garvin *v.* Wiswell, 83 Ill. 215.

[4] Watervliet Bank *v.* White, 1 Denio, 608, Beall *v.* Gen. Elect. Co., &c., 38 N. Y. S. 527; Curtis *v.* Sprague, 51 Cal. 239; Bank of Lassen Co. *v.* Sherer, 108 Cal. 513 (41 P. 415); Bank of Winona *v.* Wofford, 71 Miss. 711 (14 So. 262); Columbus Ins. Co. &c. Co. *v.* First Nat. Bank, 73 Miss. 96 (15 So. 138). See Humphreyville *v.* Culver, 73 Ill. 485.

§ 76. **Liability of assignors of bills and notes payable to bearer.**— The popular notion is that, when a bill or note is made payable to bearer, or where it is originally payable to the order of the payee, and he indorses in blank, and thereby makes it, as to subsequent transferees, an instrument payable to bearer, the assignor or transferrer not only can pass legal title to the same by delivery without indorsement; but that he is free from all liability on such a note or bill, if he had acquired title to it in a lawful way. But this is not the law. The only difference between the liability of an indorser of paper payable to order and that of transferrer of paper which is payable to bearer, is that in the first case, the indorser guarantees the payment of such note or bill; whereas the latter does not. The transferrer of a bill or note does not warrant the solvency of the maker or acceptor, respectively.

There is some respectable authority for holding that where the maker of a note or the acceptor of a bill becomes insolvent, the loss falls on the person who has title to such note or bill, when the insolvency occurs, and that he warrants the solvency of the primary obligor at the time of the transfer of the note or bill, whether he knew of the insolvency or not.[1] But there are other cases, in which it is held that the transferrer is liable to the transferee on account of the insolvency of the maker or acceptor at or before the time of transfer, only when he knew of the insolvency at the time of the transfer. That is, the transferrer only warrants that at the time of the transfer he did not know of the insolvency of the maker or acceptor, and the consequent comparative valuelessness of the paper,[2] it being only a special application of the doctrine that the

[1] Wainwright *v.* Webster, 11 Vt. 576 (34 Am. Dec. 707); Roberts *v.* Fisher, 43 N. Y. 159 (3 Am. Rep. 680); Merchants' Nat. Bank *v.* Spates 41 W. Va. 27; 23 S. E. 681; Westfall *v.* Braley, 10 Ohio St. 188 (75 Am. Dec. 509); Townsend *v.* Bank of Racine, 7 Wis. 185. See Springer *v.* Puttkamer, 159 Ill. 567 (42 N. E. 876).

[2] Young *v.* Adams, 6 Mass. 182; Addrich *v.* Jackson, 5 R. I. 218; Ware *v.* Street, 2 Head, 609 (75 Am. Dec. 755); Popley *v.* Ashley, 6 Mod. 147; Bayard *v.* Shunk, 1 Watts & S. 92 (37 Am. Dec. 441).

transferrer warrants that he does not know of anything affecting the validity or value of the bill or note.[1]

The transferrer of paper payable to bearer may, of course, expressly guarantee the payment, either verbally, in a separate writing, or by indorsement; and he will be bound thereby.[2]

On the other hand, the transferrer warrants that the bill or note is free from any defense, which would affect the genuineness or validity of the paper, as an obligation of the maker, drawer or acceptor, or which would invalidate his own title to the instrument. He is, therefore, liable if the signature of maker, drawer or acceptor or indorser has been forged,[3] or any one of these parties, whose names are on the paper, is incompetent to contract, because of some legal disability,[4] or the instrument is illegal and void.[5] He also impliedly guarantees his own title to the paper.[6]

[1] See Bridge *v.* Batchelder, 9 Allen, 394; Littauer *v.* Goldman, 72 N. Y. 506 (28 Am. Rep. 171); People's Bank *v.* Bogart, 81 N. Y. 101 (37 Am. Rep. 481).

[2] Bruce *v.* Burr, 67 N. Y. 237; Milks *v.* Rich, 80 N. Y. 269 (36 Am. Rep. 615); McPherson Nat. Bank *v.* Velde, 49 Ill. App. 21.

[3] Meyer *v.* Richards, 163 U. S. 385; Worthington *v.* Cowles, 112 Mass. 30; Bell *v.* Dagg, 60 N. Y. 528; Ross *v.* Terry, 63 N. Y. 613; Frank *v.* Lanier, 91 N. Y. 112; Terry *v.* Bissell, 26 Conn. 23; Allen *v.* Clark, 49 Vt. 390; Swanzey *v.* Parker, 50 Pa. St. 441 (88 Am. Dec. 549); Bankhead *v.* Owen, 60 Ala. 475; Challis *v.* McCrum, 22 Kan. 157 (31 Am. Rep. 181); Snyder *v.* Reno, 38 Iowa, 329; Giffert *v.* West, 37 Wis. 115; Brown *v.* Boone (Ky. '97), 41 S. W. 18. And see Spalding *v.* Gates (Ky. '97), 41 S. W. 440, as to requirement of diligence on the part of the assignee to notify and proceed against the assignor in such a case.

[4] Baldwin *v.* Van Deusen, 37 N. Y. 487; Giffert *v.* West, 37 Wis. 115. It has, however, been held by the United States Supreme Court, that where the paper is some government or municipal bond, the transferrer is not liable, if the parties who executed and negotiated the bonds were not legally qualified to do so. Otis *v.* Cullom, 92 U. S. 448. But see Meyer *v.* Richards, 163 U. S. 385. And see Rogers *v.* Walsh, 12 Neb. 28 (10 N. W. 467).

[5] Young *v.* Cole, 3 Bing. N. C. 724; Costigan *v.* Hawkins, 22 Wis. 74 (94 Am. Dec. 583); Morrison *v.* Lovell, 4 W. Va. 346; Challis *v.* McCrum, 22 Kan. 157 (31 Am. Rep. 181). In New York, the assignor is liable as an implied guarantor of the legality of the bill or note, only when he knows of the illegality at the time of his transfer of it. Littauer *v.* Goldman, 72 N. Y. 506 (28 Am. Rep. 171).

[6] Baxter *v.* Duren, 29 Me. 434 (50 Am. Dec. 602).

These warranties are implied, and hence they cannot be enforced, where the transferrer expressly withdraws them, and the transfer is made with an express disclaimer of contingent liability on the part of the transferrer.[1]

§ 77. **Liability of broker in transfer of paper by delivery.**— Where a bill or note payable to bearer is sold through a broker, and he discloses his agency, and gives the name of his principal, the principal and not he will be bound by the implied warranties, which have been explained in the preceding section.[2] But if he conceals his agency altogether, so that he assumes the role of principal, or where he only fails to disclose the name of the principal, he is personally bound to the purchaser.[3] The broker may in any case bind himself by an express warranty,[4] or, where he is liable on these implied warranties, exempt himself from such liability by an express agreement.[5]

§ 78. **Transfer by delivery of paper payable to order.**— The only complete way of transferring negotiable paper, which is payable to order, is by indorsement, and this is the only way in which the legal title to such paper may be transferred.[6] But a delivery of a note or bill, payable to order, without indorsement, will pass the equitable title to such paper.[7] But where one has possession of a note or

[1] Beal *v.* Roberts, 113 Mass. 525; Bell *v.* Dagg, 60 N. Y. 528; Ross *v.* Terry, 63 N. Y. 613.

[2] 76.

[3] Cabot Bank *v.* Morton, 4 Gray, 156; Worthington *v.* Cowles, 112 Mass. 30; Morrison *v.* Currie, 4 Duer, 79.

[4] Wilder *v.* Cowles, 100 Mass. 487.

[5] Bell *v.* Dagg, 60 N. Y. 528.

[6] See next chapter for discussion of transfer by indorsement.

[7] Richards *v.* Stephenson, 99 Mass. 311; Hale *v.* Rice, 124 Mass. 392; Van Riper *v.* Baldwin, 19 Hun, 344; Forster *v.* Second Nat. Bank, 61 Ill. App. 272; Galway *v.* Fullerton, 17 N. J. Eq. (2 C. E. Gr.) 389; Jenkins *v.* Wilkinson, 113 N. C. 532 (18 N. E. 696); Miles *v.* Reiniger, 39 Ohio St. 499; First Nat. Bank *v.* Strang, 72 Ill. 559; Taylor *v.* Reese, 44 Miss. 89; National Bank *v.* Leonard, 91 Ga. 805 (18 S. E. 160); Corle *v.* Monkhouse, 50 N. J. Eq. 537 (25 A. 157); Blesse *v.* Blackburn, 31 Mo. App. 264; Esau *v.* Greene Button Co. (Wis. '97), 68 N. W. 405. The title so ac-

bill payable to the order of another person, unindorsed, the presumption is that the title is in the latter, and the burden is on the one having possession to prove title.[1] A similar title to paper payable to order is acquired where the paper is assigned by deed or other separate instrument of assignment, whether it be accompanied by a delivery of the bill or note or not.[2]

In all such cases, the transferee by assignment does not acquire the superior title of a *bona fide* holder. He does not acquire title in the usual course of business, and therefore he takes title to the bill or note subject to all the defenses which might be set up against his assignor.[3]

Sometimes, however, a delivery or assignment is made of a bill or note payable to order presently, and an indorsement is made subsequently. As soon as the indorsement is made, the transferee and indorsee becomes a *bona fide* holder. Where the subsequent indorsement is made in pursuance of a promise to indorse, contemporaneous with

quired is properly called an equitable title only in those States, in which assignments of *choses in action* in general are still valid only in equitable. But for the purpose of distinguishing the rights of such an assignee or transferee from those of an indorsee, it is still customary to call the title of such an assignee equitable, although statute has made the title legal, and enables the assignee to sue in his own name.

[1] Durein *v.* Moeser, 36 Kan. 441 (13 P. 797); Niess *v.* Coates, 57 Ill. App. 216.

[2] Freeman *v.* Perry, 22 Conn. 617; Burdick *v.* Green, 15 Johns. 247; Burrows *v.* Keays, 37 Mich. 450; McGee *v.* Riddlesbarger, 39 Mo. 365; Osgood *v.* Artt, 17 Fed. 575; Foreman *v.* Buckwith, 73 Ind. 55; Franklin *v.* Twogood, 18 Iowa, 515; Burnham *v.* Merchants' Exch. Bank, 92 Wis. 277 (66 N. W. 510); Wood *v.* Duval (Iowa, '97), 69 N. W. 1061.

[3] Simpson *v.* Hall, 47 Conn. 417; Thomson-Houston Elec. Co. *v.* Capitol Electric Co., 56 Fed. 849; Losee *v.* Bissell, 76 Pa. St. 459; Freund *v.* Importers &c. Nat. Bank, 76 N. Y. 352 (transfer of an indorsed check); Miller *v.* Tharel, 75 N. C. 148; Benson *v.* Abbott, 95 Ga. 69 (22 S. E. 127); Matteson *v.* Morris, 40 Mich. 52; Sturges *v.* Miller, 80 Ill. 241; Patterson *v.* Case, 61 Mo. 439; Younker *v.* Martin, 18 Iowa, 143; Planters' &c. Ins. Co. *v.* Funstall, 72 Ala. 142; Hale *v.* Hitchcock, 3 Kan. App. 23 (44 P. 446); Terry *v.* Allis, 16 Wis. 478; Hadden *v.* Rodkey, 17 Kan. 429; Hardie *v.* Mills, 20 Ark. 154. But see Brown *v.* Boone (Ky. '97), 41 S. W. 18, as to the implied duty of assignee to collect the note or bill so assigned.

the assignment or delivery of the paper, the indorsement will relate back to the time of such assignment or delivery, so as to shut out all equities as effectually as if the indorsement had been made at or before the time of delivery.[1] And where the indorsement is subsequently refused, the assignor may be compelled to indorse by a decree of the court for specific performance.[2] But if there was no contemporaneous agreement for a subsequent indorsement, the indorsement operates from the time of indorsement, and the indorsee takes the paper subject to any defense which might come to his knowledge prior to the indorsement,[3] except set-offs or counter-claims, which might otherwise be set up against him as assignee.[4]

§ 79. **Sale of bill or note without delivery.**—It is a generally accepted principle of law, that a contract for the sale of goods or personal property will pass title without delivery, if such be the intention of the parties.[5] And the same conclusion is reached, where the subject-matter of the sale is a bill, note, or check. The purchaser acquires a title to the same without delivery, which he can assert against every one but a subsequent holder for value, who acquires possession of the paper without notice of the prior sale.[6] But, generally, delivery is essential to the transfer of title. And no title will pass on the executory contract of sale, unless the intention to pass title without delivery is clearly established.[7]

[1] Haskell *v.* Mitchell, 53 Me. 468 (89 Am. Dec. 176); Weeks *v.* Medler, 20 Kan. 57; Brown *v.* Wilson, 45 S. C. 519 (23 S. E. 630); Birdsell Mfg. Co. *v.* Brown, 96 Mich. 213 (55 N. W. 801).

[2] Birdsell Mfg. Co. *v.* Brown, 96 Mich. 213 (55 N. W. 801).

[3] Lancaster Nat. Bank *v.* Taylor, 100 Mass. 18 (97 Am. Dec. 70; 1 Am. Rep. 71); Clark *v.* Whitaker, 50 N. H. 474 (9 Am. Rep. 286); Beard *v.* Dedolph, 29 Wis. 136.

[4] Ranger *v.* Carey, 1 Metc. 369; Beard *v.* Dedolph, 29 Wis. 136.

[5] See Tiedeman on Sales, § 84.

[6] See Shelden *v.* Parker, 3 Hun, 498; Meyer *v.* Richards, 163 U. S. 385; Allison *v.* Barrett, 16 Iowa, 278; Allison *v.* King, 21 Iowa, 302; Mabin *v.* Kirby, 4 Rich. Eq. 105. See Dryden *v.* Britton, 19 Wis. 22.

[7] Goodwin *v.* Davenport, 47 Me. 112 (74 Am. Dec. 478); Clark *v.* Boyd,

§ 80. **Implied transfer of bills and notes.**— It is a general rule of the law of bailments, that where a thing is pledged to secure the payment of the debt, the assignment of the debt will by implication of law pass the title to the pledge to such assignee. And the same rule obtains, where the thing pledged is a bill or note.[1] And a renewal of a note or bill will likewise carry by implication all paper held as collateral security for the original.[2]

§ 81. **Transfer by legal process — Attachment, garnishment, execution.**— The three principal legal processes, whereby property may be transferred to a creditor in satisfaction of his claim, are attachment, garnishment and execution. They are all the creatures of statute, and whether bills, notes and other commercial paper can be transferred by means of them for the satisfaction of the debts of the holder, depends upon the language of the local statute, under which the question arises. That is, each statute specifies what kinds of property may be reached by attachment or execution, and property which does not come within the description contained in the statute, which provides for the attachment or other process for the enforcement of debts, cannot be reached by means of such process. It is probable, however, that a creditor's bill in equity can reach commercial paper, in any case where attachment or execution is unavoidable. In some of the statutes, bills, notes, etc., are expressly enumerated among the property which may be reached by means of the statutory process; while in others *choses in action* are only referred to in

2 Ohio, 56; Mott *v.* Wright, 4 Biss. 53; Davis *v.* Johnson, 4 Colo. App. 545; Wulschner *v.* Sells, 87 Ind. 71; Weader *v.* Bank, 126 Ind. 111 (25 N. E. 887); Meyer *v.* Richards, 163 U. S. 385.

[1] Marston *v.* Allen, 8 M. & W. 494; Walker *v.* Kee, 14 S. C. 144; Keohane *v.* Smith, 97 Ill. 156; Kelley *v.* Whitney, 45 Wis. 110 (30 Am. Rep. 697); Hall *v.* Mobile &c. R. R. Co., 58 Ala. 10; Updegraft *v.* Edwards, 45 Iowa, 513; Debruhl *v.* Maas, 54 Tex. 464; Carlton *v.* Buckner, 28 Ark. 60; Johnson *v.* Carpenter, 7 Minn. 176; Bell *v.* Simpson, 75 Mo. 485.

[2] Kidder *v.* McIlhanney, 81 N. C. 123.

general terms. The student must refer to the local statutes for a closer study of this question.[1]

§ 82. **Transfer donatio mortis causa.** — The law, in respect to gifts made in contemplation of death, is fully set forth in treatises on personal property, and a full discussion of the general subject is not needed here. It is, however, advisable to state, for the refreshment of the memory of the student, that in order that the absolute title to the thing so donated may pass to the donee, and be enforceable after the death of the donor, the following conditions are required to be fulfilled: (1) the gift must be made in apprehension of death; (2) the donor must die of the same disease which created the apprehension of death; (3) the thing donated must have been delivered to and accepted by the donee or by some third person for him.

At one time it was held to be doubtful whether a chose in action could be the subject of a *donatio mortis causa*. It was first held, in relaxation of the original rule, that bills, notes, and other commercial paper, could be so transferred, where they were payable to bearer, or where they were payable to order and indorsed by the donor. Finally, it was held, and it is the law today, that indorsement is in no case essential; that where the paper was payable to the order of the donor, the donee, on delivery and acceptance, at least acquired an equitable title, which he could successfully assert against the personal representatives of the deceased donor, as well as against the parties to the note or bill.[2] But the donor cannot make a valid *donatio mortis causa* of his own bill, note, or check,

[1] For a summary of the statutory provisions, see Tiedeman on Commercial Paper, § 251.

[2] House *v.* Grant, 4 Lans. 296; Stevens *v.* Stevens, 2 Hun, 470; Chase *v.* Redding, 13 Gray, 418; Hunt *v.* Hunt, 119 Mass. 474; Brown *v.* Brown, 18 Conn. 409 (46 Am. Dec. 338); Burke *v.* Bishop & Risley, 27 La. Ann. 465 (21 Am. Rep. 567); Ashbrook *v.* Ryon, 2 Bush, 228 (92 Am. Dec. 481); Darland *v.* Taylor, 52 Iowa, 503 (3 N. W. 510).

since his own paper is only an executory contract; and if it be without consideration, as is most likely in such cases, would not be an enforceable contract.[1]

ILLUSTRATIVE CASES.

Mumford *v.* Weaver, 18 R. I. 801 (31 A. 1).
Weader *v.* Frost Nat. Bank, 126 Ind. 111 (25 N. E. 887).
Willis *v.* Heath, 75 Tex. 124 (12 S. W. 971).

Ownership of and Right to Sue on, Bill or Note Indorsed in Blank.

Mumford *v.* Weaver, 18 R. I. 801 (31 A. 1).

Per Curiam. The defendants plead that the note in suit is the property of one Maria S. Sanders, a resident of Massachusetts, and that the plaintiff has no interest in the note, having received it after maturity and without consideration, and that he holds it as custodian, merely, for the purpose of collecting it and paying the proceeds to the said Maria S. Sanders. The plaintiff demurs to the plea. The question thus presented for decision is whether the plaintiff is entitled, in the circumstances stated in the plea, to sue upon the note. We think he is. The plea does not aver that the plaintiff's possession of the note is mala fide. Any one in possession of a note indorsed in blank is prima facie the holder, and may sue upon it, until his right is disproved. It is no defense to an action on such paper that the property in it is in another, and not in the plaintiff. All that is required of the plaintiff, in the first instance, is to present the note; its possession being prima facie evidence of his ownership of the note, and his right to sue. It is only after the defendant has adduced evidence that the note was obtained by undue means, such as fraud, duress, theft, or the like, that the plaintiff is called upon to offer proof of other facts in support of his title. 2 Pars. Notes & B. 436; Bank *v.* Senior, 11 R. I. 376; Third Nat. Bank *v.* Angell, Index O O, 176; 29 Atl. 500. The plaintiff being a resident of Providence, the suit was properly brought in Providence county. Judiciary Act, c. 13, § 2. The cases from the reports of the United States supreme court, cited by the defendants in support of the plea, hold merely that in determining the question of jurisdiction the citizenship of parties substantially

[1] Warren *v.* Durfee, 126 Mass. 338; Dean *v.* Caruth, 108 Mass. 242; Raymond *v.* Sellick 10 Conn. 480; Phelps *v.* Pond, 23 N. Y. 69; Curry *v.* Powers, 70 N. Y. 212 (26 Am. Rep. 577); Blanchard *v.* Williamson, 70 Ill. 647; Voorhees *v.* Woodhull (4 Vroom) 34 N. J. L. 482; Second Nat. Bank *v.* Williams, 13 Mich. 282; Hamor *v.* Moore, 8 Ohio St. 239; Simmons *v.* Cincinnati Sav. Soc., 31 Ohio St. 457 (27 Am. Rep. 521).

interested in the suit, rather than that of nominal parties, is to be regarded. We do not see that they have any application to the question before us.

Effect of Assignment of Note without Delivery.

Weader *v.* First Nat. Bank, 126 Ind. 111 (25 N. E. 887).

BERKSHIRE, C. J. The appellee, who was the plaintiff below, sued the appellant upon a promissory note executed by him to one Mary A. Reiffel, and by her indorsed to the appellee as collateral security. The appellee recovered judgment. The facts which appear in the special finding of the court, so far as we need state them, to present the one question which we are called upon to decide, are about as follows: The appellee's indorser had, long before the execution of the note sued on, executed her note to one M. V. West, and which had matured before the commencement of this action. Before notice of the assignment of his note to the appellee, the appellant had, by parol, purchased the note executed by the said indorser from the holder thereof. The facts involved in the transaction between West and the appellant were as follows: On the 10th day of July, 1887, the appellant purchased said note, and agreed to pay therefor the sum of $100, with the privilege to the vendee of accepting meat (the appellant being a butcher) or cash, or both, at his pleasure, and at the time 50 cents was paid in meat, but at that time West did not have the note with him, and for that reason it was not delivered to the appellant; that before the 1st day of November, 1887, West had received from the appellant in meat, on account of the purchase price of said note, $20. On the said 1st day of November the appellee notified the appellant that it held his said note, which was the first notice the appellant had thereof; that on the next day but one following West delivered to the appellant, pursuant to the purchase, as agreed upon, the note of the appellee's indorser; and the question arises whether or not the appellant was entitled to a set-off on account of said last-named note, as against the note sued on. The trial court held, as a conclusion of law, that the right of set-off did not exist.

The appellant has in his brief cited us to no authority in support of his contention that the appellant was entitled to the benefit of the set-off claimed. In Waterman on Set-Off, § 55, it is said that the defendant may set off a claim of which he is the absolute owner, although he may not have the strict legal title to it. In section 104 the same author says that where a negotiable note is assigned for a valuable consideration, and an action is brought for the benefit of the assignee, in the name of the payee, the maker may set off a debt due to him at the time of the assignment from the payee. At section 112 the author says that when a note or other liability of the payee of a note is attempted

to be set off by the maker of the note on which the suit is brought, as against the assignee, such set-off cannot be allowed, unless it appears that the defendant was the owner of such set-off at the time he received notice of the assignment. In McCormick *v.* Eckland, 11 Ind. 293, this court held that an assignment of a promissory note is incomplete without delivery. The case above was approved and followed in Wulschner *v.* Sells, 87 Ind. 71. In Mendenhall *v.* Baylies, 47 Ind. 575, it is said that, to pass the title to a promissory note, either from the maker to the payee or from the payee to an indorser, there must be a delivery, actual or constructive. Under the contract of purchase here in question no time was fixed within which the note was to be delivered by West to the appellant, and, until delivery, there was no transfer of ownership. The appellant was not in a condition to maintain replevin for the note, had West, upon demand, refused to assign the note. The contract was but an executory contract for the purchase and sale of the note. Had West, after making the contract, brought suit against Mrs. Reiffel on the note, she could not have made a successful defense to the action on the ground that he was not the party in interest. Under our statute it is not necessary, to give to the defendant the right of set-off in an action brought by the assignee of a chose in action, that he hold the legal title to the claim which he seeks the benefit of when he receives notice of the assignment of his obligation, but he must be the absolute owner thereof. Section 348 provides that "a set-off shall be allowed only in actions for money demands upon contract, and must consist of matter arising out of debt, duty, or contract, liquidated or not, held by the defendant at the time the suit was commenced, and matured at or before the time it is offered as a set-off." Section 5503: "Whatever defense or set-off the maker of any such instrument [referring to negotiable paper, except such as is protected by the law-merchant] had before notice of assignment against the assignor or against the original payee, he shall have also against the assignee" These sections are to be construed together. In Claflin *v.* Dawson, 58 Ind. 408, it was held by this court that a set-off is a cross-action by the defendant against the plaintiff, in an action by the latter for "money demands upon contracts," and the indebtedness upon which it depends must be so held by the defendant, at a time when he may acquire the right of set-off, that he could maintain an independent action upon it. When the appellant received notice that the appellee held his note he was not in a position to maintain an action against Mrs. Reiffel on the note she executed to West. The case of Shepherd *v.* Turner, 3 McCord, 249, cited by counsel for the appellee, involved the principle here under consideration. The court in that case said: "Something like a contract appears to have taken place between the payee of the note and the defendant, and, to use the language of the judge, 'the defendant had the election of taking the note of that date.' If he had the election to take he had the right to refuse; and

that right must have been reciprocal. It was, therefore, at most, a mere naked contract, and could not have been enforced on either side. But even if the contract had been completed for a valuable consideration, as long as it remained executory, and the right to the note not changed by actual delivery, it was not a subject of set-off. Debts to be set off must be mutual, subsisting debts at the time the action is commenced." See Osgood *v.* Artt, 17 West. Jur. 463. We find no error in the record. Judgment affirmed, with costs.

Garnishment of Bill or Note by Creditor of Payee or Holder.

Willis *v.* Heath, 75 Tex. 124 (12 S. W. 971).

Gaynes, J. Appellants, being judgment creditors of R. H. Heath and B. D. Wilson, partners, composing the firm of Heath & Wilson, sued out a writ of garnishment, and caused it to be served upon appellee. Appellee answered, denying that he owed the defendant, and that he had any of their effects in his possession. Appellants contested his answer, alleging, in substance, that after the accrual of the indebtedness of Heath & Wilson to them B. D. Wilson sold his interest in the partnership effects to his partner, R. H. Heath, who, in consideration therefor, executed to him four promissory notes for the same, in the agreggate of $2,500, with the appellee as his surety; that, before the last note fell due, appellee purchased of R. H. Heath the store-house which had formerly belonged to Heath & Wilson, and the stock of goods belonging to R. H. Heath, and in the transaction assumed the payment of the balance due upon the notes, which amounted to $1,735.35, and that for this sum appellee executed to Mrs. M. F. Wilson, the wife of B. D. Wilson, his promissory note, due two years after date. This last note was alleged to have been executed on the day before the judgment in favor of appellants against Heath & Wilson was rendered. It was also alleged that at the time of its execution, R. H. Heath and B. D. Wilson were insolvent and that it was made for the purpose of hindering, delaying, and defrauding their creditors in the collection of their debts. The pleading contesting the answer was excepted to on the ground that the debt sought to be reached was evidenced by a negotiable promissory note, and was therefore not subject to the writ of garnishment; and the exception was sustained, and judgment rendered for the garnishee.

The allegations in appellants' pleading must be taken most strongly against them, and it must therefore be assumed that the note upon which the appellee is sought to be charged is a negotiable instrument. The appellants' counsel, in their brief, present the case upon that theory, and concede the general rule that the maker of a negotiable promissory note cannot be subjected to the

payment of the same, under the writ of garnishment, before its maturity. They claim, however, that the present case is an exception to the rule, because the note in controversy was made negotiable, and payable to Mrs. Wilson, for the purpose of defrauding Wilson's creditors. We find no authority for the doctrine for which appellants contend. It is universally held that, although ordinarily the garnishee can be held liable under the writ only to the extent of his liability to the debtor of the plaintiff, yet he may be charged with property fraudulently transferred to him by such debtor, although the latter have no cause of action against him. This is but an application of the familiar doctrine that a fraudulent conveyance is void as to creditors, although good as between the parties. This doctrine is applicable in a case where the garnishee holds the effects of the debtor under a fraudulent assignment or transfer. The maker of a negotiable promissory instrument is not subject to be charged by a writ of garnishment, because, if this be done, he is liable to be made to pay the same debt twice over; and we find no authority for holding that the rule is different when he executes the note with the knowledge that it is the purpose of the payee to place the fund beyond the reach of his creditors. We think there would be as much reason for holding one who pays a debt, knowing that the person to whom it is paid intends to withhold it of his creditors. If the maker of a promissory note may be charged in garnishment, before its maturity, on the ground that he knew when he executed it that it was the purpose of the payee to place the fund beyond the reach of his creditors, we see no reason why one who pays a debt with a knowledge of a like intent on part of his creditor may not be compelled to pay again, at the suit of the creditors of him to whom he has made the payment. The giving of a negotiable promissory note is a mode of payment. The case of Wood *v.* Bodwell, 12 Pick. 268, is in point, and holds that the maker of a negotiable instrument, under such circumstances, is not subject to be charged under the writ of garnishment. In States where the statute permit the garnishment of a debt evidenced by negotiable instruments, a different rule may prevail. So, also, if, after the maturity of a note, it be shown that it is in the hands of one who has received it with a knowledge that the payee had transferred with intent to defraud his creditors, the maker may be held chargeable. There a different principle applies. We conclude that appellee was not chargeable in this case. We have treated the transaction as if the note had been payable to B. D. Wilson, instead of his wife.

We find no error in the action of the court allowing the garnishee an attorney's fee for preparing his answer. In Johnson *v.* Blanks, 68 Tex. 405; 4 S. W. Rep. 557, we held that such an allowance, in such a case, was proper, and that an amount fixed by the court, in the absence of testimony showing that it was too much, would be deemed conclusive. We find no error in the judgment, and it is affirmed.

CHAPTER VIII.

TRANSFER BY INDORSEMENT.

SECTION 83. The meaning, purpose and effect of indorsement.
84. Liability of an indorser.
85. Liability of indorser "without recourse."
86. Successive indorsements — Liability for contribution and exoneration.
87. The place for indorsement —Allonge.
88. Form of the indorsement.
89. Indorsements in full and in blank.
90. Absolute, conditional and restrictive indorsements.
91. Time and place of indorsement.
92. Irregular indorsements — Joint makers, grantors, indorsers.

§ 83. **The meaning, purpose and effect of indorsement.**— The literal meaning of indorsement is writing *on the back*, derived from the latin *in dorsa*. But in this connection, the word is used to indicate a legal transaction, effected by a writing of one's name on the back, whereby one not only transfers one's full legal title to the paper transferred, but likewise enters into an implied guaranty that the primary obligor, the maker, drawer or acceptor, as the case may be, will duly pay the amount of money called for by the paper, if it is duly presented for payment at the day of its maturity; and if it be a bill, if it is duly presented at the proper time for acceptance, as well as for payment. The indorsement then [1] is of a dual character. It is, *first*, the means of effecting a legal transfer of the title to the bill or note, which is indorsed; and *secondly*, a guaranty that it will be duly honored. The second phase of the indorsement makes it an executory contract, and in order that it may be enforceable, it must be sup-

[1] As to irregular indorsements, see *post*, § 92.

ported by a valuable consideration.[1] As a means of transfer of title to the bill or note, it is valid as between the parties to the indorsement without any consideration, although it is presumed to have been made for a consideration.[2]

Delivery of the paper, and its acceptance by the indorsee, are essential to a complete indorsement, and these facts are implied in the allegation of indorsement. Until there has been a delivery and acceptance, the mere writing of the payee's or indorsee's name on the back of a bill or note, does not constitute a complete indorsement.[3] A regular indorsement can only be made by one who is entitled to receive payment, either as original payee or indorsee.

As has been already stated in the preceding chapter[4] where a negotiable paper is payable to bearer, full legal title may be transferred without indorsement, and by delivery only. But where the bill or note is payable to order, while the equitable or incomplete, though substantial, title may pass by delivery only; the full legal title, together with the superior character and rights of a *bona fide* holder, can be acquired by a transferee only when the bill or note is transferred by indorsement.[5] While indorsement is not necessary to the transfer of the full legal

[1] McKnight *v.* Wheeler, 6 Hill, 492; Meriden Steam Mill *v.* Guy, 40 Conn. 163; Morrison *v.* Lovell, 4 W. Va. 346; McPherson *v.* Weston, 64 Cal. 275; Freeman *v.* Bingham, 65 Ga. 580; Sinker *v.* Fletcher, 61 Ind. 276; National Bank *v.* Green, 33 Iowa, 140.

[2] Weston *v.* Hight, 17 Me. 287 (35 Am. Dec. 250); Dunn *v.* Morris, 24 Conn. 333; Frederick *v.* Winans, 51 Wis. 472 (8 N. W. 301); Hinkley *v.* Fourth Nat. Bank, 77 Ind. 475; Luning *v.* Wise, 64 Cal. 410.

[3] Laird *v.* Davidson, 124 Ind. 412 (25 N. E. 7); Goodwin *v.* Davenport, 47 Me. 112 (74 Am. Dec. 478); Wulschner *v.* Sells, 87 Ind. 71; Spencer *v.* Carstarphen, 15 Colo. 445 (24 P. 882); Clark *v.* Boyd, 2 Ohio, 56; Kittle *v.* DeLamater, 3 Neb. 325; Cooper *v.* Nock, 27 Ill. 301; Middleton *v.* Griffith, 57 N. J. L. 442; 31 A. 405.

[4] See *ante*, § 75.

[5] Blakely *v.* Grant, 6 Mass. 386; Rand *v.* Dovey, 83 Pa. St. 280; Dryden *v.* Britton, 19 Wis. 22; Wade *v.* Guppinger, 60 Ind. 377. But see *contra*, under local statute, Security Bank *v.* Lucas (Minn. '97), 71 N. W. 822.

title of a bill or note, which is payable to bearer, unless the local statute provides to the contrary,[1] if such paper is actually indorsed, the indorser assumes towards the subsequent holders of the paper the same liability, which he sustains in his indorsement on paper which is payable to order.[2]

Where the paper is non-negotiable, there is, generally speaking, no room for the application of the principles of indorsement. But, although it has been held in some cases, that the indorser of a non-negotiable bill or note does not assume any liability as a guarantor, unless he has made the indorsement "with recourse," or has expressly indicated in some other way his intention to assume the liability of an indorser;[3] it is generally held that the implied liability of an indorser will attach in such a case, at least in favor of the immediate indorsee or transferee.[4]

It is also held that the indorsement of a non-negotiable instrument is an absolute guaranty of payment, and not dependent upon prior presentment and notice of dishonor.[5] And so absolutely independent of the original contract is in such a case the contract of indorsement, that the indorser of a non-negotiable instrument cannot be joined in the same

[1] In some States, the statutes require indorsement whether the paper be payable to bearer or order. Garvin *v.* Wiswell, 83 Ill. 215; Blackman *v.* Lehman, 63 Ala. 547 (35 Am. Rep. 57).

[2] Gilbert *v.* Nantucket Bank, 5 Mass. 97; Brush *v.* Reeves, 3 Johns. 435; Smith *v.* Rawson, 61 Ga. 208; Johnson *v.* Mitchell, 50 Tex. 212 (32 Am. Rep. 602).

[3] Klein *v.* Keiser, 87 Pa. St. 485; Cromwell *v.* Hewitt, 40 N. Y. 491 (100 Am. Dec. 527); Story *v.* Lamb, 52 Mich. 525; Merchants' Nat. Bank *v.* Gregg (Mich., 96), 64 N. W. 1052; Whisler *v.* Bragg, 31 Mo. 124; Samstag *v.* Conley, 64 Mo. 476.

[4] Jones *v.* Fales, 4 Mass. 245; Raymond *v.* Middleton, 29 Pa. St. 529; Ransom *v.* Sherwood, 26 Conn. 437; Parker *v.* Riddle, 11 Ohio, 102; Wilson *v.* Ralph, 3 Iowa, 450; Lynch *v.* Mead (Iowa), 68 N. W. 579; Carruth *v.* Walker, 8 Wis. 103 (76 Am. Dec. 235); Castle *v.* Candee, 16 Conn. 223; Gilbert *v.* Seymour, 44 Ga. 63; Seymour *v.* Van Slyck, 8 Wend. 403; Cromwell *v.* Hewitt, 40 N. Y. 491 (100 Am. Dec. 527); Snyder *v.* Oatman, 16 Ind. 265.

[5] See cases in preceding note. But see *contra*, Sutton *v.* Owen, 65 N. C. 123.

action with the maker of the note, or acceptor of a bill, as can be done where the paper is negotiable.[1]

But in order that one may indorse a non-negotiable paper and thereby assume the implied liability of an indorser, the paper must be *quasi*-negotiable; *i. e.* it must be of the general character of a bill, note or check, and lacking only one or more of the requisites of negotiability. For example, one does not assume the liability of an indorser by indorsing a judgment.[2]

Finally, an indorsement, in order that it may have the technical effect of an indorsement, must be full and complete. It cannot be partial. An indorsement to one, of a part of the amount called for by the bill or note, can only operate as an assignment *pro tanto* of the paper, and such assignee cannot claim the superior character of a *bona fide* holder.[3] But, as a matter of course, the bill or note may be indorsed to two or more jointly, each acquiring an aliquot share in the paper, but they must sue jointly.[4] And so, also, there may be an indorsement in full to a third person, with a collateral agreement that the indorsee is to hold a part of the money due on the paper in trust for the indorser or some third person, without affecting the character of the indorsement.[5]

§ 84. **Liability of an indorser.**— As already stated, indorsement has a dual legal character: *first*, it is the means of transferring title to the bill or note which is indorsed; *secondly*, it is an implied contract of guaranty on the part of the indorser. In this connection, the latter phase of the indorsement will be considered. We are to

[1] Cochran *v.* Strong, 44 Ga. 636; First Nat. Bank of Trenton *v.* Gay, 71 Mo. 627.

[2] Kelsey *v.* McLaughlin, 76 Ind. 379.

[3] Hughes *v.* Kiddell, 2 Bay, 324; Fordyce *v.* Nelson, 91 Ill. 447; Frank *v.* Kalgler, 36 Tex. 305; Hutchinson *v.* Simon, 57 Miss. 628; Scott *v.* Liddell, 98 Ga. 24 (25 S. E. 935).

[4] Flint, *v.* Flint, 6 Allen, 34 (83 Am. Dec. 615); Nat. Exch. Bank *v.* Silliman, 65 N. Y. 475; Conover *v.* Earl, 26 Iowa, 167; Herring *v.* Woodhull, 29 Ill. 92 (81 Am. Dec. 296).

[5] Reid *v.* Furnival, 1 C. & M. 538; 5 C. & P. 499.

determine the scope and limitations of the liability of the indorser as a guarantor or warrantor.

Naturally, the indorser would be bound by the same warranties, which are imposed by law on the transferrer of paper payable to bearer. The indorser impliedly warrants that the prior parties, including drawer and acceptor of a bill, the maker of a note, and the indorsers of both, were competent to contract,[1] that the signatures of all the prior parties to the paper are genuine and that he has a legal title to the paper,[2] and that the bill or note is legal and does not violate any law, such as the law against usury or gambling.[3]

In addition, however, to these implied warranties, which are imposed alike upon the indorser and the transferrer of paper payable to bearer, the indorser guarantees that the instrument will be honored by the original parties at maturity, if duly presented for payment; and, if it be a bill, that it will be accepted when it is presented. But in either case, the indorser is not liable unless notice of dishonor is given to him by the holder within the time required. The guaranty of the indorsement is conditional upon the presentment and notice; and, if it is a case for protest, upon the making of the proper protest.[4]

[1] Bowman *v.* Hiller, 130 Mass. 153 (39 Am. Rep. 442); Erwin *v.* Downs, 15 N. Y. 575; Turner *v.* Keller, 66 N. Y. 66; Robertson *v.* Allen, 59 (9 Heisk.) Tenn. 233.

[2] Terry *v.* Bissell, 26 Conn. 23; Onondaga Co. Sav. Bk. *v.* United States, 64 Fed. 703; 12 C. C. A. 407; Chapman *v.* Rose, 56 N. Y. 137 (15 Am. Rep. 401); Colson *v.* Arnot, 57 N. Y. 253 (15 Am. Rep. 496); Condon *v.* Pearce, 43 Md. 83; Howe *v.* Merrill, 5 Cush. 80; Fish *v.* First Nat. Bank, 42 Mich. 203; Cóchran *v.* Atchison, 27 Kan. 728; Dumont *v.* Williamson, 18 Ohio St. 515 (98 Am. Dec. 186); Rhodes *v.* Jenkins, 18 Colo. 49 (31 P. 491; an irregular indorser).

[3] Railroad Co. *v.* Schulte, 103 U. S. 118; Burrill *v.* Smith, 7 Pick. 291; Nat. Bank of Pittsburg *v.* Wheeler, 60 N. Y. 612; Stewart *v.* Bramhall, 74 N. Y. 85; Huston *v.* First Nat. Bank, 85 Ind. 21; Watson *v.* Cheshire, 18 Iowa, 202 (87 Am. Dec. 382); Fish *v.* First Nat Bk., 42 Mich. 203; Ward *v.* Doane, 77 Mich. 328 (43 N. W. 980; but indorsee must not know of the illegality).

[4] Ogden *v.* Saunders, 12 Wheat. 313; Ray *v.* Smith, 17 Wall. 411; Field *v.* Nickerson, 13 Mass. 131; Cutler *v.* Parsons, 13 App. Div. 376 (43 N. Y. S. 187); Disborough *v.* Vanness, 7 N. J. L. (3 Hal.) 231; Freeman *v.* O'Brien, 38 Iowa, 406; Clark *v.* Trueblood (Ind. App. '97),

But the warranties, which are common to indorsements and transfers without indorsement, are absolute and not conditional upon presentment, protest and notice.[1]

§ 85. **Liability of indorser "without recourse.**— An indorser may by express agreement relieve himself of liability for the dishonor of the bill or note, which he has indorsed, by inserting in the indorsement a qualification of his liability. Any words, expressive of the agreement, would be sufficient; but this qualification of his liability is usually indicated by the addition to the indorsement of the words "without recourse." When an indorsement is made "without recourse," the indorser is not liable, if the primary obligor does not honor the paper at maturity. Although, in commercial circles, an indorsement "without recourse" lowers the marketable value of the paper, it does not in law raise any presumption as to the financial responsibility of the parties, or cast any suspicion upon the legal character of the paper.[2] But an indorsement "without recourse" does not relieve the indorser from anything but his implied guaranty that the paper will be duly honored. He is still bound by the implied warranties of the competency of the parties, genuineness and legality of the instrument and the validity of his own title to it.[3]

44 N. E. 679; Chapman *v.* McCrea, 63 Ind. 360; Selover *v.* Snively, 24 Kan. 672; Evans *v.* Baker (Kan. App. '97), 47 P. 314; Crim *v.* Starkweather, 88 N. Y. 339 (42 Am. Rep. 250); Allin *v.* Williams, 97 Cal. 403 (32 P. 441); State Sav. Bank *v.* Baker, 93 Va. 510 (25 S. E. 550). See succeeding chapters X, XI, XII on Presentment for Paper, Protest and Notice.

[1] Copp *v.* McDougall, 9 Mass. 1; Cochran *v.* Atchison, 27 Kan. 728. But see in this connection, Susquehanna Val. Bank *v.* Loomis, 85 N. Y. 207 (39 Am. Rep. 652).

[2] Wilson *v.* Codman's Exrs., 3 Cranch, 195; Welch *v.* Lindo, 7 Cranch, 159; Fitchburg Bank *v.* Greenwood, 3 Allen, 434; Stevenson *v.* O'Neill, 71 Ill. 314; Bevan *v.* Fitzsimmons, 40 Ill. App. 108; Borden *v.* Clark, 26 Mich. 410; Mott *v.* Hicks, 1 Cow. 513 (13 Am. Dec. 550); Fassin *v.* Hubbard, 55 N. Y. 465; Kelley *v.* Whitney, 45 Wis. 110 (30 Am. Rep. 697); Lawrence *v.* Dobyns, 30 Mo. 196; Cross *v.* Hollister, 47 Kan. 652 (28 P. 693).

[3] Ticonic Bank *v.* Smiley, 27 Me. 225 (46 Am. Dec. 593); Frazer *v.*

§ 86. **Successive indorsements — Liability for contribution and exoneration.**— Indorsers guarantee the payment of the instruments to all subsequent indorsees, and for that reason they are liable in case of non-payment in the order in which their indorsements were made, each indorser being liable for the whole amount of the bill or note to every subsequent indorsee, but not to the prior indorsers. The indorsements are presumed to have been made in the order in which they appear on the paper. But, as between themselves, *i. e.*, between the immediate indorsers and indorsees, the order may be changed by special agreement; or it may be shown by parol evidence that the actual order of indorsement was different from what it appears on the bill or note. Unless the parties have made an agreement to the contrary, each indorser is liable *in solido* to the successive subsequent indorsees, and any one or more of them may be sued in the same action. The holder cannot be required to join them all.[1]

If two indorsers appear on the face of the paper to have been joint payees or indorsees, their indorsements, although apparently successive, are really joint; and if one pays the note or bill, he will have contribution from the other, to the extent of one-half, unless a special agreement to the

D'Invilliers, 2 Pa. St. 200; Dumont *v.* Williamson, 18 Ohio St. 516 (98 Am. Dec. 186); Brown *v.* Ames, 61 N. W. 448; 59 Minn. 476; Watson *v.* Cheshire, 10 Iowa, 202 (87 Am. Dec. 382); Challis *v.* McCrum, 22 Kan. 157 (31 Am. Rep. 181); Ware *v.* McCormack, 96 Ky. 139 (28 S. W. 959); Drennan *v.* Bunn, 124 Ill. 175 (16 N. E. 100); Hecht *v.* Batcheller, 147 Mass. 335 (17 N. E. 651); Spencer *v.* Halpern, 62 Ark. 595 (37 S. W. 711).

[1] McCarty *v.* Roots, 21 How. 437; Germania Bank *v.* Follette, 72 Fed. 145; Shaw *v.* Knox, 98 Mass. 214; Kirschner *v.* Conklin, 40 Conn. 77; Easterly *v.* Barber, 66 N. Y. 433; Wolf *v.* Hostetter, 182 Pa. St. 292 (37 A. 988); Slack *v.* Kirk, 67 Pa. St. 380 (5 Am. Rep. 438); Bank of U. S. *v.* Beirne, 1 Gratt. 234 (42 Am. Dec. 551); Willis *v.* Willis, 42 W. Va. 522 (26 S. E. 515); Davis *v.* Morgan, 64 N. C. 576; Camp *v.* Simmons, 62 Ga. 73; Givens *v* Merchants' Nat. Bank, 85 Ill. 442; Williams *v.* Merchants' Nat. Bank, 67 Tex. 606 (4 S. W. 163); Hale *v.* Danforth, 46 Wis. 554 (1 N. W 284); Freeman *v.* Ellison, 37 Mich. 459; Sweet *v.* Woodin, 72 Mich. 393 (40 N. W. 471); Holmes *v.* First Nat. Bank, 38 Neb. 326 (56 N. W. 1011).

contrary is shown.[1] Where two successive indorsees are not joint payees or indorsees, while the presumption is that they are successive indorsers, parol evidence is admissible to prove that they were in fact joint indorsers, in order to establish the claim of contribution of one from the other.[2]

Where the bill or note is indorsed by the payee, and by one who is otherwise a stranger to the obligation, it is presumed that the indorsement of the payee is prior in point of time to the latter's indorsement. But if the latter is in fact the prior indorsement, this may be shown by parol evidence, in order to determine the liability of one to the other, but not to affect the rights of the *bona fide* holder against either.[3]

§ 87. **The place for indorsement — Allonge.** — Of course the proper place for an indorsement is on the back of the bill, note or check; for the literal meaning of *indorsement* is writing *on the back*. But in order that a signature and other accompanying writing may have the full effect of an indorsement, if made by the proper party, it is not necessary that it be put on the back of the paper. It may be written anywhere else on the paper; but in that case, it must be shown, in case of dispute, to have been written as an indorsement. But a signature or other signed written transfer of paper, which does not appear on some part of the bill or note, is not an indorsement, although it would operate as an effective assignment of the paper.[4] Where,

[1] Lane *v.* Stacey, 8 Allen, 41; Hagerthy *v.* Phillips, 83 Me. 336 (22 A. 223); Hull *v.* Meyers, 90 Ga. 674; 16 S. E. 653; Van Patten *v.* Ulrich, 59 Hun, 628. But see Palmer *v.* Field, 76 Hun, 229.

[2] Mulcare *v.* Welch, 160 Mass. 58 (35 N. E. 97); Slack *v.* Kirk, 67 Pa. St. 380 (5 Am. Rep. 438); Slagle *v.* Rust, 4 Gratt. 274; Givens *v.* Merchants' Nat. Bank, 85 Ill. 442; Hale *v.* Danforth, 46 Wis. 554 (1 N. W. 284). But see *contra*, Johnson *v.* Ramsey, 42 N. J. L. 279 (39 Am. Rep. 580).

[3] McCarty *v.* Roots, 21 How. 437; Shaw *v.* Knox, 98 Mass. 214; Kirschner *v.* Conklin, 40 Conn. 77; Hubbard *v.* Guernsey, 64 N. Y. 457; Stillwell *v.* How, 46 Mo. 589; Hogue *v.* Davis, 8 Gratt. 4; Cady *v.* Sheppard, 12 Wis. 713; Moody *v.* Findley, 43 Ala. 167.

[4] Com. *v.* Butterick, 100 Mass. 1 (97 Am. Dec. 65); Haines *v.* Dubois,

however, by the frequent and numerous transfers of the paper, the entire available space on the back has been exhausted in writing the successive indorsements, a piece of paper may be attached to the bill or note by mucilage or otherwise, and all additional indorsements may be written on this attached paper. The attached paper is called an *allonge* and becomes a part of the instrument.[1]

§ 88. **Form of the indorsement.** — An absolutely essential element in every indorsement is the signature of the party who has the right to transfer the paper, and who intends by such indorsement to transfer the title to the bill or note. The full name should be given in the signature, and it is usual to do so, but the initials would suffice.[2] But it is really not necessary for the person who has the right to transfer the paper to use his customary signature. Any writing which was intended by such a party as a signature, would be sufficient. Thus, the figures "1, 2, 8" placed on the back of a bill or note, with the intention of transferring title, was held to be sufficient to bind the transferrer as an indorser.[3]

If the indorsement does not consist simply of the signature, it is usually accompanied by the words "pay to A. or order,[4] or "pay to the order of A." But it is not necessary to adopt this formula. As will be explained more fully in the next section, a simple signature of the payee or indorsee is sufficient; and where one desired to limit or qualify the indorsement, others such as "assigns,"

30 N. J. 259; Arnott *v.* Symonds, 85 Pa. St. 99 (27 Am. Rep. 630); Quin *v.* Sterne, 26 Ga. 223 (71 Am. Dec. 204); Shain *v.* Sullivan, 106 Cal. 208 (39 P. 606); Manion Gravel Road Co. *v.* Kessinger, 66 Ind. 553; Herring *v.* Woodhull, 29 Ill. 92 (81 Am. Dec. 296); Gorman *v.* Ketchum, 33 Wis. 427.

[1] Folger *v.* Chase, 18 Pick. 63; Crosby *v.* Roub, 16 Wis. 616 (84 Am. Dec. 720); Fountain *v.* Bookstaver, 141 Ill. 461 (31 N. E. 17).

[2] Merchants' Bank *v.* Spicer, 6 Wend. 443; Rogers *v.* Colt, 6 Hill, 322; Corgan *v.* Frew, 39 Ill. 31 (89 Am. Dec 286).

[3] Brown *v.* Butchers' and Drovers' Bank, 6 Hill, 443 (41 Am. Dec. 755). See to same effect, Flint *v.* Flint, 6 Allen, 34 (83 Am. Dec. 615).

[4] Or bearer.

("to A or his assigns") would answer just as well, provided language is not employed, which limits the liability of the transferrer. The transferrer is liable in any of these cases as an indorser.[1] But there must be words of transfer. A guaranty is not a good indorsement.[2]

§ 89. **Indorsements in full and in blank.**— When an instrument is made payable by indorsement to *A or order*, or *to the order of A*, it is called an *indorsement in full*, and no one but the indorsee named can demand payment, unless he in turn indorses. While it is proper for words of negotiability to be inserted in the indorsement, their absence from the indorsement will not destroy the further negotiability of the paper, as long as they are inserted in the body of the instrument.[3]

Where the payee or indorsee writes only his name on the back of the bill or note, it is called an *indorsement in blank;* and as long as it remains in that condition, the instrument is transferable by delivery, as if it was originally payable to bearer. But the subsequent transferee may fill up the prior blank indorsement, by making it payable to the order of himself or of some one else, to whom he proposes to deliver it, and thereby make it an indorsement in full.[4] And where there are successive indorse-

[1] Sears *v.* Lantz, 47 Iowa, 658; Shelby *v.* Judd, 24 Kan. 161; Walker *v.* Krebaum, 67 Ill. 252. See Aniba *v.* Yeomans, 39 Mich. 171, and *ante*, § 85.

[2] Trust Co. *v.* Nat. Bank, 101 U. S. 68. But see *contra*, Meitz *v.* Wolfe, 28 Neb. 500 (44 N. W. 485); Buck *v.* Davenport, 29 Neb. 407 (45 N. W. 776); Packer *v.* Wetherell, 44 Ill. App. 95. And see Brotherton *v.* Street, 124 Ind. 599 (24 N. E. 1068) ("sign" held to be sufficient); Maine Trust &c. Co. *v.* Butler, 45 Minn. 506 (48 N. W. 333) (assign sufficient); Marks *v.* Corey (Mich.), 66 N. W. 493 (assign is sufficient); Derry *v.* Holman, 27 S. C. 621 (2 S. E. 841, do).

[3] Potter *v.* Tyler, 2 Met. 58; Leavitt *v.* Putnam, 3 N. Y. 494 (53 Am. Dec. 322); Reamer *v.* Bell, 79 Pa. St. 292; Muldrow *v.* Caldwell, 7 Mo. 563.

[4] Evans *v.* Gee, 11 Pet. 80; Central Bank *v.* Davis, 19 Pick. 374; Condon *v.* Pearce, 43 Md. 83; Phelps *v.* Church, 65 Mich. 231 (32 N. W. 30); Morris *v.* Preston, 93 Ill. 215; Everett *v.* Tidball, 34 Neb. 803 (52 N. W. 816); Andrews *v.* Simms, 33 Ark. 771; Farr *v.* Ricker, 46 Ohio St. 265 (21 N. E. 354); Johnson *v.* Mitchell, 50 Tex. 212 (32 Am. Rep. 602);

ments in blank, the holder may make any one of them an indorsement in full to his or another's order or he may fill them all up, making them indorsements to the order of the successive indorsers in blank, and thus show regular indorsements in full from the payee to himself. Where he makes one of the blank indorsements payable to his order, the other indorsers in blank are not thereby released from liability unless he cancels their indorsements.[1]

Indorsements in full, on the other hand, cannot be made indorsements in blank, by striking out the superscription of the indorsement.[2]

§ 90. **Absolute, conditional and restrictive indorsements.**— Most indorsements are generally what is called absolute; and the liability of the indorser is subject to the single condition that there must be a presentment for payment and notice of non-payment to the indorser; and, whenever protest is required, that the bill or note so indorsed shall be duly protested for non-payment. But while it is very uncommon, other conditions may be attached to the indorsement, without destroying the negotiability of the paper. Until the stipulated condition is performed, the indorsee cannot demand payment, and payment to him before performance of the condition will discharge the obligation to the indorser of the maker of the note, or acceptor of the bill, which has been indorsed conditionally.[3]

The more common kind of qualified indorsements is

Skinner *v.* Church, 36 Iowa, 91; Custis *v.* Sprague, 51 Cal. 239; Jones *v.* Shapera, 57 Fed. 457; 6 C. C. A. 423; McAuliffe *v.* Reuter, 63 Ill. App. 255.

[1] Craig *v.* Brown, Pet. C. C. 171; Bank *v.* Ellis, 9 Fed. 46; Cole *v.* Cushing, 8 Pick. 48; Ritchie *v.* Moore, 5 Munf. 388 (7 Am. Dec. 688); Chautauqua Co. Bk. *v.* Davis, 21 Wend. 584; Bank of America *v.* Senior, 11 R. I. 376. But if he cancels an indorsement in blank, he will thereby release the subsequent indorsers, unless it is done with their consent. Curry *v.* Bank of Mobile, 8 Port. 360; Union Nat. Bank *v.* Grant, 48 La. Ann. 18 (18 So. 705).

[2] Porter *v.* Cushman, 19 Ill. 572; Morris *v.* Poillon, 50 Ala. 403.

[3] Robertson *v.* Kensington, 4 Taunt. 30; Soares *v.* Glyn, 14 L. J. Q. B. 313; Tappam *v.* Ely, 15 Wend. 362.

what are known as restrictive indorsements, indorsements which are made with restrictions as to the purpose of the indorsement. Restrictive indorsements destroy the negotiability of the bill or note, as long as they are not canceled, or the restrictions not removed. An indorsement to "A only" or *to the use*, or *for the credit* or *account*, of the indorser or of some other person, is a restrictive indorsement.[1] Another very common kind of restrictive indorsement is the indorsement "for collection."[2]

The power of further transfer is taken away altogether by a restrictive indorsement, and the restrictive indorsee is only empowered to hold or collect the money due on such bill or note, and apply it to the use or benefit of the person for whom the indorsement has been made. Inasmuch as the restriction is written on the back of the paper, a subsequent purchaser is charged with notice of the limited title of the indorsee.[3] Such an indorsee cannot even bring suit on the bill or note, if it has been dishonored. The suit must be brought by the person for whose benefit the indorsement was made. This is undoubtedly the case where the indorsement is "for collection."[4] The restrictive in-

[1] White *v.* Miners' National Bank, 102 U. S. 658; Wilson *v.* Holmes, 5 Mass. 543 (4 Am. Dec. 75); Hook *v.* Pratt, 78 N. Y. 371 (34 Am. Rep. 539); Lawrence *v.* Fussell, 77 Pa. St. 460; Williams *v.* Potter, 72 Ind. 354; Johnson *v.* Mitchell, 50 Tex. 212 (32 Am. Rep. 602); Carrillo *v.* McPhillips, 55 Cal. 130.

[2] Goetz *v.* Bank of Kansas City, 119 U. S. 551; Sweeney *v.* Easter, 1 Wall. 166; Fawsett *v.* Nat. Life Ins. Co., 97 Ill. 11 (37 Am. Rep. 95); Freeman's Nat. Bank *v.* Nat. Tube Works Co., 151 Mass. 413 (24 N. E. 779); Flanagan *v* Brown, 70 Cal. 254 (11 P. 706); Mechanics' Bank *v.* Valley Packing Co , 70 Mo. 643; First Nat. Bank *v.* Gregg, 79 Pa. St. 384; Rock Co. Nat. Bank *v.* Hollister, 21 Minn. 385.

[3] First Nat. Bank *v.* Reno Co. Bank, 3 Fed. 257; Hook *v.* Pratt, 78 N. Y. 371 (34 Am. Rep. 539); Bank of Clarke Co. *v.* Gilman, 81 Hun, 486; Claflin *v.* Wilson, 51 Iowa, 15 (50 N. W. 578); People's Bank *v.* Jefferson Co. Sav. Bank, 106 Ala. 524 (17 So. 728); Boyer *v.* Richardson (Neb. '97), 71 N. W. 981; and cases cited in preceding note.

[4] White *v.* National Bank, 102 U. S. 658; Third Nat. Bank *v.* Nat. Bank, 102 U. S. 663; Rock County Bank *v.* Hollister, 21 Minn. 385; U. S. Nat. Bank *v.* Crosley, 86 Iowa, 633 (53 N. W. 352).

dorsement "for collection" or for the use or benefit of the indorser, may be recalled at any time as long as it has not been paid; and an absolute indorsement, or presumably an assignment, to another would work an implied revocation of the restrictive indorsement.[1] And where the indorser cannot recall the restrictive indorsement, as where it is to "A. only," a reindorsement to the indorser, or a second absolute indorsement by him to the restrictive indorsee, would restore the negotiability of the paper.[2]

An agreement, attached to the indorsement, that the indorser shall not sell the bill or note so indorsed, does not make it a restrictive indorsement. It is only a collateral agreement, the breach of which would only give rise to an action for damages.[3]

§ 91. **Time and place of indorsement.** — Although the time of indorsement is of importance, in determining whether the indorsee is entitled to the protection of a *bona fide* holder,[4] the bill or note may be transferred by indorsement, and the indorser is bound by his guaranty of the honor of the paper, whether the indorsement is made before or after maturity.[5]

If the indorsement is not dated — and it is not customary to date the indorsement — it is presumed, in the absence of evidence to the contrary, that it was made before maturity, and that, therefore, the indorsee took the

[1] Atkins *v.* Cobb, 51 Ga. 86; Brook *v.* Van Nest, 58 N. J. L. 162 (33 A. 382); Brauch *v.* U. S. Nat. Bank (Neb. '97), 70 N. W. 34.

[2] Fawsett *v.* Nat. Life Ins. Co., 97 Ill. 11 (37 Am. Rep. 95); Holmes *v.* Hooper, 1 Bay, 160; Marskey *v.* Turner, 81 Mich. 62 (45 N. W. 644) (oral agreement to transfer absolute title sufficient).

[3] Leland *v.* Parriott, 35 Iowa, 454. See Equitable Ins. Co. *v.* Harvey (Tenn. '97), 40 S. W. 1092.

[4] As to which, see *post*, § 107.

[5] National Bank of Washington *v.* Texas, 20 Wall. 72; Baxter *v.* Little, 6 Met. 71 (39 Am. Dec. 707); French *v.* Jarvis, 29 Conn. 387; James *v.* Chalmers, 6 N. Y. 209; Leavitt *v.* Putnam, 3 N. Y. 494 (53 Am. Dec. 322); Brown *v.* Hull, 33 Gratt. 287; McSherry *v.* Brooks, 46 Md. 103; Powers *v.* Nelson, 19 Mo. 190; First Nat. Bank of Salem *v.* Grant, 71 Me. 374.

paper free from any defect of title or other equitable defense.[1]

The indorsement is also presumed to have been made at the place where the instrument was dated.[2]

§ 92. **Irregular indorsements — Joint makers, guarantors, indorsers.**— It is a very common practice, in this country at least, for one to guarantee the payment of a bill or note, merely by writing his name on the back of the paper. Since he had not been payee or indorsee of the bill or note, he is not really an indorser; for an indorser is strictly one who transfers an instrument which is payable to his order by writing his name on the back of the instrument, and incidentally guarantees its payment. In the case under inquiry, he does not intend, nor in fact does he do more than, to guarantee the payment of the bill or note. Two difficulties are experienced in determining the character in which he becomes liable. *First*, the statute of frauds requires all guaranties to be in writing; and merely signing his name on the back of the paper, without stating for what purpose he has so signed, is not a compliance with the requirements of the Statute of Frauds. This objection could be avoided, if the facts warranted the construction that the party so signing became a joint maker of a note, or joint drawer of a bill. But in the case of notes so indorsed, the second difficulty will not have been overcome, viz.: that a party, so guaranteeing the payment of a note, expects to be notified of the dishonor of the paper, as a condition precedent to his liability on such indorsement. Joint makers of notes are not entitled to notice.

In their attempts to avoid these dilemmas, the courts have reached contradictory conclusions as to the character

[1] New Orleans Canal &c. Co. *v.* Montgomery, 95 U. S. 16; Good *v.* Martin, 95 U. S. 90; Noxon *v.* DeWolf, 10 Gray, 343; Balch *v.* Onion, 4 Cush. 559; Pinkerton *v.* Bailey, 8 Wend. 600; Smith *v.* Nevlin, 89 Ill. 193; Dodd *v.* Doty, 98 Ill. 393; Mason *v.* Noonan, 7 Wis. 609; Patterson *v.* Carrell, 60 Ind. 128; Gage *v.* Averill, 57 Mo. App. 111; Smith *v.* Ferry, 69 Mo. 142; Rahm *v.* King-Bridge Mfg. Co., 16 Kan. 530.

[2] Maxwell *v.* Vansant, 46 Ill. 58.

in which such an indorser is to be held liable. There seems to be an unanimity of opinion, that where the paper is payable to bearer, originally or made so subsequently by an indorsement in blank, a subsequent indorsement in blank is presumed to be a regular indorsement, and, at least a subsequent indorser, as against the payee named in the paper, and other indorsers, who have transferred the paper by indorsement.[1] But when the signature of this irregular indorser precedes in point of place the indorsement of the payee, or when there is an unbroken line of indorsements in full from the payee to the present holder, in none of which does this irregular indorser appear as an indorsee, it is plain that he has not become an indorser, by virtue of his prior character as payee or indorsee. In the absence of parol evidence, showing his real character, it is left to judicial presumption to determine in what character he has bound himself by such an indorsement.

Where his indorsement appears before the indorsement of the payee, it is not irrational to presume that it was put there before the negotiation of the instrument, that he signed as joint maker, and that the same consideration supports his liability as well as that of the real maker.[2] And perhaps a plurality of the cases maintain, in contradiction of the real facts of most cases, that an irregular indorser is *prima facie* liable as a joint maker.[3]

[1] Dubois *v.* Mason, 127 Mass. 37 (34 Am. Rep. 335); Lank *v.* Morrison, 44 Kan. 594 (24 P. 1106); Thacher *v.* Stevens, 48 Conn. 561 (33 Am. Rep. 39); Armstrong *v.* Harshman, 61 Ind. 52 (28 Am. Rep. 665); Montgomery *v.* Crossthwaite, 90 Ala. 553 (8 So. 498); Frank *v.* Lilienfeld, 33 Gratt. 393; Hately *v.* Pike, 162 Ill. 241 (44 N. E. 451); Chicago T. & Sav. Bank *v.* Nordgren, 157 Ill. 663 (42 N. E. 148).

[2] Good *v.* Martin, 95 U. S. 90; Hagar *v.* Whitmore, 82 Me. 248 (19 A. 444); Way *v.* Butterworth, 108 Mass. 509; Spencer *v.* Allerton, 60 Conn. 410 (22 A. 778); Hayden *v.* Weldon, 42 N. J. L. 128 (39 Am. Rep. 551); Morrison Lumber Co. *v.* Lookout Mt. Hotel Co., 92 Tenn. 6 (20 S. W. 292); Stein *v.* Passmore, 25 Minn. 256; Blakeslee *v.* Hewett, 76 Wis. 341 (44 N. W. 1105); Miller *v.* Clendennin, 42 W. Va. 416 (26 S. E. 512).

[3] Good *v.* Martin, 95 U. S. 90; Brooks *v.* Stackpole (Mass. '97), 47 N. E. 419; Peninsular Sav. Bank *v.* Hosie (Mich. '97), 70 N. W. 890; Rossi *v.* Schawacker, 66 Mo. App. 67; Woods *v.* Woods, 127 Mass. 141; Spaulding *v.* Putnam, 128 Mass. 363; Com. *v.* Powell, 11 Gratt. 828; Davidson

A great many cases, on the other hand, hold this irregular indorser to be liable as a guarantor, and either hold that the Statute of Frauds does not apply to such cases, so as to require a writing of the terms of the guaranty above the guaranty, or concede to the holder the implied power to write out the guaranty above such an indorsement.[1]

Again, other cases hold him to be a joint-maker, with the liability of a guarantor.[2]

Finally, in other States, this irregular indorser is held to have the same liability and the same right of notice, as a regular indorser; in most cases, being treated as the second indorser in the absence of parol evidence to the contrary,[3] although, at least in New York, where the indorsement of a stranger precedes that of the payee, the irregular indorser is presumed to be a first indorser.[4]

v. Powell, 114 N. C. 575 (19 S. E. 601); McCallum *v.* Driggs (17 So. 407); 35 Fla. 277; Owings *v.* Baker, 54 Md. 82 (39 Am. Rep. 353); Moynahan *v.* Hanford, 42 Mich. 329; Allison *v.* Kinne, 104 Mich. 141 (62 N. W. 152); Semple *v.* Turner, 65 Mo. 696; First Nat. Bank *v.* Payne, 111 Mo. 291; 208 W. 41 (peculiar case); Best *v.* Hoppie, 3 Colo. 139; Schultz *v.* Howard, 63 Minn. 196 (65 N. W. 363); Robinson *v.* Bartlett, 11 Minn. 410; Salisbury *v.* First Nat. Bank, 37 Neb. 872 (56 N. W. 727); Houghton *v.* Ely, 26 Wis. 181 (7 Am. Rep. 52); Donohue-Kelly Banking Co. *v.* Puget Sound Sav. Bk., 13 Wash. 407, 411 (43 P. 359, 942); Provident Sav. L. Ass. Co. *v.* Edmonds, 95 Tenn. 53 (31 S. W. 168).

[1] Parkhurst *v.* Vail, 73 Ill. 343; Boynton *v.* Pierce, 79 Ill. 145; Holbrook *v.* Camp, 38 Conn. 23; Chaddock *v.* Vanness, 35 N. J. L. 517; Rivers *v.* Thomas, 1 Lea, 649 (27 Am. Rep. 784); Welsh *v.* Ebersole, 75 Va. 651; Robinson *v.* Abell, 17 Ohio St. 36; Crooks *v.* Tully, 50 Cal. 254; Fuller *v.* Scott, 8 Kan. 254; Gumz *v.* Giegling (Mich.), 66 N. W. 48; Varley *v.* Title Guarantee & T. Co., 60 Ill. App. 565. But see, as to what will support this presumption, Cozzens *v.* Chicago Hydraulic Press, etc., Co., 166 Ill. 213 (46 N. E. 788).

[2] Syme *v.* Brown, 19 La. Ann. 147; Chandler *v.* Westfall, 30 Tex. 477; Killian *v.* Ashley, 24 Ark. 511 (91 Am. Dec. 519).

[3] Phelps *v.* Visher, 50 N. Y. 69 (10 Am. Rep. 433); Hendrie *v.* Kinnear, 84 Hun, 141; Browning *v.* Merritt, 61 Ind. 425; Newbold *v.* Boraef, 155 Pa. St. 227 (26 A. 305); Johnston *v.* McDonald, 41 S. C. 81 (19 S. E. 65); Cady *v.* Shepard, 12 Wis. 713; Bradford *v.* Prescott, 85 Me. 482 (27 A. 461); Needhams *v.* Page, 3 B. Mon. 465; Perry *v.* Friend, 57 Ark. 437 (27 S. W. 1065); Buscher *v.* Murray, 21 D. C. 612; State Trust Co. *v.* Owen Paper Co., 162 Mass. 156 (by statute); 38 N. E. 438.

[4] Moore *v.* Cross, 19 N. Y. 227 (75 Am. Dec. 326); Jaffray *v.* Brown,

In very many of the States, now, the matter is regulated by statute; in some, the irregular indorser being declared to be a guarantor, and in others, an indorser.[1]

In the absence of statute, controlling the question, the presumptions, heretofore explained as prevailing in the different States, are all rebuttable by parol evidence of the actual intent with which the irregular indorsement was made. Parol evidence is admissible to show that such an indorser intended to be bound, either as joint maker, guarantor, surety or indorser.[2]

But if an indorsement is regular, *i. e.*, it constitutes a link in the successive transfer of the bill or note from the payee to the last indorsee, parol evidence is not admissible to show that an indorser did not intend to be bound as such, at least as against a *bona fide* holder.[3]

74 N. Y. 393; Bank of Port Jervis *v.* Darling, 91 Hun, 236; Wade *v.* Creighton, 25 Oreg. 455 (36 P. 289).

[1] For a fuller discussion of this perplexing question, see Tiedeman Com. Paper, §§ 270, 271.

[2] Good *v.* Martin, 95 U. S. 90; Patch *v.* Washburn, 16 Gray, 82; Brown *v.* Butler, 99 Mass. 179; Eilbert *v.* Finkbeiner, 68 Pa. St. 243 (8 Am. Rep 176); Owings *v.* Baker, 54 Md. 82 (39 Am. Rep. 353); Cahn *v.* Duston, 60 Mo. 297; Baker *v.* Robinson, 63 N. C. 191; Browning *v.* Merritt, 61 Ind. 425; Eberhart *v.* Page, 89 Ill. 550; Worden *v.* Salter, 90 Ill. 160; Seymour *v.* Mickey, 15 Ohio St. 515; Holmes *v.* Preston, 70 Miss. 152 (12 So. 202).

[3] Latham *v.* Houston Flour Mills, 68 Tex. 127 (3 S. W. 462); Howe *v.* Merrill, 5 Cush. 80; Hauer *v.* Patterson, 84 Pa. St. 274; Long *v.* Campbell, 37 W. Va. 665 (17 S. E. 197); Finley *v.* Green, 85 Ill. 535; Doom *v.* Sherwin, 20 Colo. 234 (38 P. 56); Barnard *v.* Goslin, 23 Minn. 192; Simmons *v.* Camp, 64 Ga. 726.

ILLUSTRATIVE CASES.

Allin *v.* Williams, 97 Cal. 403 (32 P. 441).
Watson *v.* Chesire, 18 Iowa, 202 (87 Am. Dec. 382).
Farr *v.* Ricker, 46 Ohio St. 265 (21 N. E. 354).
People's Bank *v.* Jefferson Co. Sav. Bank, 106 Ala. 524 (17 So. 728).
Blakeslee *v.* Hewitt, 76 Wis. 341 (44 N. W. 1105).

Authority of Agent to Indorse for Principal — Ratification — Double Effect and Purpose of Indorsement.

Allin *v.* Williams, 97 Cal. 403 (32 P. 441).

Department 1. Appeal from superior court, Los Angeles county; W. J. Clark, Judge.

Action by John Allin, trustee, against R. Williams, to recover a balance due on a note indorsed by defendant. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

Harrison, J. In February, 1888, 10 individuals, including the plaintiff and the defendant herein, borrowed upon their individual credit the sum of $10,000, for the use and benefit of the Pasadena Lake Vineyard, Land & Water Company, a corporation in which they were interested ($5,000 thereof from the San Gabriel Valley Bank, and $5,000 from a Mrs. Banta), for which they gave their joint and several notes. About a month afterwards the corporation paid to the defendant a sufficient sum of money therefor, for the purpose of taking up the notes and repaying the sums thus advanced, and the defendant deposited the same with the San Gabriel Valley Bank, to the credit of "R. Williams et al." He immediately paid the loan that had been made by the bank, but Mrs. Banta refused to accept the money on her note, for the reason that it would not mature for nearly a year, and thereupon the money for its payment, viz., $5,221.98, was left in the bank to the aforesaid credit. Prior to this time the defendant had contracted to sell to one Webster certain real property in Pasadena, and Webster had contracted to sell a portion of the same property to one Wilson. Webster was owing defendant $5,000 on his contract of purchase, and Wilson was owing to Webster a little more than this amount on his contract with him; and on April 18, 1888, in pursuance of an arrangement between them for the purpose of liquidating these several obligations, the defendant made a conveyance of the land to Wilson, Webster uniting therein. Wilson executed to the defendant his note for $5,000, payable February 10, 1889, and secured the same by a mortgage upon the land, made to the defendant, as trustee for the 10 individuals who had signed the Banta note; and on April 21st the defendant transferred the aforesaid sum of $5,221.98 from the account of "R. Williams et al.," to his own personal account in the same bank. In September of that year several of these individuals expressed a dissatisfaction with

his acts relating to the money, and thereupon the defendant, acting through his attorney, Wright, who was one of the 10, surrendered to Wilson the aforesaid note and mortgage, and took from him a new note for $5,000, maturing February 10, 1889, payable to "R. Williams or order," together with a mortgage on the same property, securing its payment, and on the same day indorsed the note to the order of "John Allin, as trustee," the plaintiff herein, and assigned the mortgage to him "in trust for the benefit" of the 10 contributors, naming them. After the Wilson note had matured, the plaintiff brought an action thereon, making Wilson and the defendant herein defendants in the action. Wilson suffered default, and the plaintiff, having dismissed the defendant herein from the action, took judgment against Wilson for the amount of the note, and for a sale of the mortgaged property. Upon the sale under that judgment the property was bid in by the plaintiff for the sum of $2,400, and the sheriff returned a deficiency judgment of $3,737. Thereupon the plaintiff, as trustee for the benefit of the 10 contributors, brought this action to recover from the defendant the amount of this deficiency.

1. The action against the defendant is for the purpose of enforcing his liability as an indorser upon the Wilson note. The averments of a recovery of judgment in the action against Wilson, and of the proceedings thereunder, are for the purpose of showing that a portion of the note has been paid by subjecting the security given therefor to a sale, and thus determining the amount to be recovered from the defendant. The right to maintain an action against the indorser of a note whose payment has been secured by a mortgage given by the maker, after judgment has been recovered against the maker in a suit to foreclose, was established in Vandewater *v.* McRae, 27 Cal. 596.

2. The court finds that Wright, who was the defendant's attorney, by whom the indorsement was made, was fully authorized to indorse the note, and there was sufficient evidence before it to authorize this finding. Aside from the general power of attorney which he had given him, the defendant directed Wright, at the time he was leaving the State, in September, just after objection had been made by the contributors to his disposition of the money, to fix the matter up to suit those who were making those objections, and while he was absent from the State he sent a telegram to Wright to exercise his best judgment in arranging the matter. In addition to this, the defendant himself, after his return to Pasadena, indorsed upon the note a waiver of payment, presentment for payment, protest and notice of protest, and the court was authorized to treat this act as an affirmance and ratification of the prior indorsement by his attorney.

3. The appellant contends that his indorsement of the note to the plaintiff was without consideration, and merely for the purpose of transferring the title thereto, and that he did not incur the liability of an indorser. An indorser may show, as between himself and his immediate indorsee, that the indorsement was

made merely for the purpose of transferring the note from a nominal holder to the true owner, as from an agent to his principal; or that the circumstances under which the indorsement was made were such as would render it inequitable to enforce an indorser's liability against him (McPherson *v.* Weston, 85 Cal. 90; 24 Pac. Rep. 733); but in any such case the burden of establishing such a defense to the apparent liability attendant upon his indorsement rests upon the indorser. The court below found upon evidence (which we think amply sustains its finding), that the "indorsement on the said note was made for the purpose of making the said defendant liable as an indorser of said note, and giving to the persons for whose benefit the plaintiff prosecutes this action the additional security of such indorsement and was made and received in settlement of the differences which existed between the defendant and the said persons and that it is untrue that said indorsement was without consideration." When the money was placed in the hands of the defendant, he was but a mere depositary thereof for the purpose of paying the Banta note, and after Mrs. Banta had refused to accept it until the note should mature, he still held it in trust for the 10 contributors, without any authority to make any other disposition of it. Although some of these contributors expressed an opinion that the money ought not to lie idle, but should earn as much interest as they were paying to Mrs. Banta, still the defendant does not claim to have had any express authority to make a loan of it, but seeks to uphold his action by showing that there was a general desire that it should be loaned. He does not claim to have spoken specifically to more than three or four of the contributors, and they contardicted his statement, and, as well as the others, testified that the loan to Wilson was made without their knowledge. Under this evidence the court was authorized to find that the making of the loan to Wilson was his own act, and those for whom he held the money had the right to hold him responsible for any loss. They had the right to demand of him a transfer to another trustee of all of the money which had originally been placed in his hands for the purpose of paying the Banta note, irrespective of the use which he had made of it; but, instead thereof, they agreed to accept a transfer of the Wilson note and mortgage, with the additional security of the defendant's indorsement. This was a direct advantage to the defendant, as it relieved him from the obligation to make immediate payment of the trust money, and gave him the contingent advantage of having his obligation entirely satisfied out of the mortgage security given by Wilson. The defendant does not contend that there was any express agreement by which his indorsement of the Wilson note was to be taken in satisfaction of his liability for the money left with him in trust, but insists that the circumstances under which the indorsement was made show that it was so intended. Instead, however, of it appearing in the evidence that it was the intention

of the parties to accept the Wilson note and mortgage in satisfaction of the obligation of the defendant, the circumstances and negotiations between them at the time of the transaction show that the parties were dealing at arm's-length, and that the contributors were demanding the indorsement of the defendant as an additional security; and the court was justified in finding that it was given for that purpose. It is undoubtedly true that when a trustee holds funds which it is his duty to invest, and when the beneficiaries are interested chiefly in the income resulting from such investment, he will not be held liable for a depreciation of the security, or even for a loss in an investment that was made by him in good faith, and upon suitable security which was ample at the time of the investment. But this rule has no application to the present case. The defendant was a trustee of the moneys placed in his hands for the sole purpose of paying the Banta note, and when that could not be done his duty was merely to hold the money until those for whose benefit he held it should give him definite directions. He was at no time a trustee for the purpose of lending, or with power to lend, the money. The court, moreover, finds that his acts in making the loan were not only not authorized by the contributors, but also that the loan itself was not made in good faith. The land which he took from Wilson as security for the note was at the time held by him as security for an obligation of Webster to himself, and he was pressing Webster for payment. Although several of the witnesses testified that, in their opinion, the land was at that time a sufficient security for the loan, yet they were unable to corroborate their opinion by evidence of a sale of any land in that vicinity at any time between the transaction with Wilson and the time of the trial, and it appeared that within a little more than a year it sold for less than half the amount of the loan. It was also shown that lands were then declining in value, and Webster was himself willing to deduct $1,200 from the amount due him from Wilson, in order to effect the arrangement by which Wilson should be substituted for himself as the debtor to the defendant. These facts authorized the court to find that the defendant dealt with the trust property for his own profit, in violation of section 2229, Civil Code, and, consequently, that he did not act in good faith in making the loan. Section 2234, Id.

4. The judgment in the case of Allin *v.* Wilson is not set forth in the record, and we cannot say that it is of such a character as to constitute a bar to the present action. The mere filing of a dismissal with the clerk, or the entry of an order of dismissal in the minutes of the court, would not, of itself, constitute such a bar. The facts shown in reference to the dismissal justify the conclusion that it was filed before the hearing of the matter upon the default of Wilson.

5. It was not necessary that the plaintiff should have alleged in his complaint or shown an offer to assign to the defendant the deficiency judgment against Wilson, or that the judgment herein

should direct that such assignment be made. Although an indorser is entitled, upon payment of a note which he has indorsed, or of a judgment against the maker rendered thereon, to an assignment thereof, yet such assignment is not a condition of the plaintiff's right of recovery, but is a right accruing to the defendant by reason of his payment.

6. A considerable portion of the brief on behalf of the appellant has been devoted to a discussion of the relative rights of the plaintiff and the defendant in the property bought under the Wilson judgment, as well as in the deficiency judgment, in case he shall satisfy the present judgment; and he argues therefrom that, as he is liable for only his share of the Banta note, there can be no right of action against him until that share shall have been ascertained by a sale of the property bought in under the Wilson judgment, and the means of collecting the deficiency judgment against Wilson shall have been exhausted. It is unnecessary for us, however, to pass upon these questions, as they are not involved in this action. This is an action by the plaintiff, as trustee for the 10 contributors, to recover from the defendant the unpaid amount of the note taken by him from Wilson, and indorsed to the plaintiff. The relative rights and obligations of the defendant towards the several contributors can be presented in an action for their adjustment at the settlement of the trust, after the Banta note shall have been paid. The judgment and order denying a new trial are affirmed.

We concur: Garoutte, J.; Paterson, J.

Indorsement without Recourse — Liability of Indorser.

Watson *v.* Chesire, 18 Iowa, 202 (87 Am. Dec. 382).

This is a joint action, against John and Wesley Chesire and John M. Griffith. The facts, necessary to an understanding of the case, are as follows: John and Wesley Chesire sold, May 15, 1858, certain land in Mills County to one Moore, receiving, for part of the purchase-money, his note, secured by a mortgage on a portion of the land sold.

Afterward, January 20, 1860, the Chesires traded or sold the note and mortgage of Moore (which note was dated May 15, 1858, was for the sum of $743, payable one year after date, with ten per cent interest) to the defendant Griffith, receiving in payment or exchange ninety acres of land, a mare and a heifer, variously estimated by the witnesses as being worth from $250 to $400, and upwards. *The Chesires indorsed* to Griffith *the note* and *mortgage, without recourse to them.*

Afterward, about April, 1860, Griffith traded or exchanged the Moore note and mortgage to the plaintiff, Watson, for certain land, also indorsing the same, *without recourse.*

Watson sues the Chesires and Griffith on the indorsement. The nature of the pleadings and questions raised will appear in

the opinion. Verdict and judgment for the defendants, and plaintiff appeals.

DILLON, J. The first error assigned by the plaintiff is, that "the court erred in sustaining the defendants' demurrer to the *first count* of the petition." This makes it essential to set out the substance of this count with accuracy.

It commences by alleging that John and Wesley Chesire held and owned the Moore note and mortgage, describing them; that January 20, 1860, the said Chesires, for a good and valuable consideration (*but not alleging what*), sold and assigned said note to their co-defendant, Griffith, whereby they falsely warranted the said note to be genuine, unpaid and unsatisfied in any way; that afterward Griffith, assignee as aforesaid, sold and assigned said note to the plaintiff for a good and valuable consideration, whereby he, Griffith, falsely warranted, etc., as above; that plaintiff relied upon said warranties and paid *Griffith* for said note; that the said note, at the time the same was assigned by Chesires to Griffith, and by Griffith to the plaintiff, "had been fully paid, extinguished, and nothing was due thereon from the said Moore to the defendants or either of them;" whereby "the defendants fraudulently deceived the plaintiff, to his damage" in the amount of said note. Copies of these assignments are set forth, showing that they were made "*without recourse*." The first was an assignment *in full* by J. and W. Chesire to "John M. Griffith or order, without recourse." The next was in blank, as follows: "Without recourse. John M. Griffith."

To this the court sustained a demurrer, both in behalf of the Chesires and of Griffith.

We will consider the case, with respect to the Chesires, separately and first.

Upon consideration, we think the demurrer was rightly sustained.

It is only by treating this count as founded upon the *indorsement*, that the *plaintiff's* action against the *Chesires* has any color or plausibility.

There is, except through the indorsement, no privity between the plaintiff and the Chesires. The latter sold the note to Griffith, and not to the plaintiff. The plaintiff purchased of Griffith, not of the Chesires. No transaction is alleged between the plaintiff and the Chesires. Hence, the plaintiff's right to sue the latter, if it exists at all, must exist by virtue of the contract of indorsement.

Now if this count be treated as one *ex contractu* upon the indorsement, it is not maintainable, because the indorsement, on *its face*, *negatives and rebuts any personal liability on the part of the Chesires*. This is the object and effect of an indorsement "without recourse."

Such an indorsement transfers title, but stipulates for exemption from the ordinary responsibility of an indorser. It will not,

however, protect the assignor from liability over from fraud and misrepresentation in the assignment of the note. In point, see Welch *v.* Lindo, 7 Cranch, 159; 2 Curtis' ed. 496; Epler *v.* Funk, 8 Pa. St. (8 Barr) 468, 469; Prettyman *v.* Short, 5 Har. (Del.) 360; Richardson *v.* Lincoln, 5 Metc. 201; Rice *v.* Stearns, 3 Mass. 225; Waite *v.* Foster, 33 Maine, 424; Goupy *v.* Harden, 7 Taunt. 159, per Dallas, J.; Chitty on Bills, 218, 225, 235; Story on Notes, § 146; Lyons *v.* Miller, 6 Grat. (Va.) 427.

Suppose it to be true that, in the transfer of the Moore note by Chesires to Griffith, the latter was deceived and defrauded. This would give Griffith his right of action against the former. Suppose it to be true, also, that the plaintiff was deceived and defrauded by Griffith. This would give him a right of action against the latter. *He* could not sue the Chesires for the fraud they practiced upon Griffith.

So that the reasoning drives us back to the point at which we started, viz., the plaintiff cannot sue Chesires *ex contractu*, having had no transaction with them except upon the indorsement. If the first count is treated as being founded upon that, it fails, because the indorsement itself not only does not create, but expressly avoids, a cause of action. (*Vide authorities above cited.*)

The case presents the question, *What*, in the absence of special contract, are the obligations of the transferrer of negotiable paper, who indorses it *without recourse?* It seems to us that the obligations of a transferrer of such paper, by indorsement *without recourse*, are substantially the same as those of a transferrer of such paper when payable to bearer by delivery merely.

It is a clear and well-settled doctrine, that such a transfer does not make the party liable as indorser. When he indorses paper without recourse, or transfers it (if payable to bearer or if indorsed in blank) by delivering merely, without putting his name upon it, he ceases to be a party to the paper. He cannot be made liable as a party to or upon the instrument.

There may be a liability in such cases, but it arises upon the transaction, upon the facts of the case, to be asserted in an action for the original consideration *or its value or for fraud practiced*, and not upon the indorsement or upon the paper transferred. Speaking of the same general subject, in the well-known case of Jones *v.* Ryde, 1 Marsh. 157; 5 Taunt. 489, Gibbs, C. J., says: The ground of resisting this claim is, that it was a negotiable security without indorsement; and that when the holder of a negotiable security passes it away, *without indorsing it*, he means not to be responsible upon it. This doctrine was fully discussed in the case of Fenn *v.* Harrison, 3 T. R. 757; and the proposition is true, but only to a certain extent. "If a man pass an instrument of this kind without indorsing it, *he cannot be sued as indorser*, but he is not released from the responsibility which he incurs by passing an instrument which appears to be of greater value than it really is."

And this case is recognized as authority in the text-books, and in England in subsequent cases: Wilkinson *v.* Johnson, 3 B. & C. 428, and in this country: Cabot Bank *v.* Morton, 4 Gray, 156.

The accepted doctrine on this subject may be thus stated: Where a note is transferred without recourse, equally as when it is transferred by delivery only, the transferrer is exempted from all the ordinary responsibilities which attach to such a transfer. (See authorities first in this opinion cited.)

But he does not, unless such is the agreement, understanding, or contract of the parties, stand free from all obligations. Thus, unless otherwise agreed, he warrants that the paper so transferred is genuine, and not forged or fictitious. Jones *v.* Ryde, supra; Fuller *v.* Smith, Ryan & Mood. 49; 1 C. & P. 197; Chitty on Bills, 245; Story on Notes, § 118; Aldrich *v.* Jackson, 1 R. I. 218; 2 Parsons on Notes and Bills, ch. 2, § 2, p. 37, and authorities; Lyons *v.* Miller, 6 Gratt. 247; Morrison *v.* Currie, 4 Duer, 79; Cabot Bank *v.* Morton, *supra;* Rieman *v.* Fisher, 4 Am. Law Reg. 433. He warrants by implication, *nothing to the contrary being shown*, that it is of the kind and description that it purports on its face to be. Allen *v.* Pegram, 16 Iowa, 163, in relation to illegal bank stock; Gompertz *v.* Bartlett, 2 Ellis & Bl. 849; 24 Eng. L. & Eq. 156, where the vendor of a bill was held liable, though he did not put his name upon it; Young *v.* Cole, 3 Bing. N. C. 714, as to liability of vendor on the sale of invalid Guatemala bonds; and see, further, the authorities above referred to, and Kempson *v.* Sanders, 11 Bing. 5; Redfield on Railways, 50, note; Hilliard on Sales, p. 456, § 37; Eaton *v.* Mellus, 7 Gray, 566, which decides that there is an implied warranty that the assignor has done nothing, and will do nothing, to prevent the assignee from collecting the claim assigned.

So there is an implied warranty, unless it is otherwise agreed, that the parties to the instrument are *sui juris*, and capable of contracting: Theall *v.* Newell, 19 Verm. 202; Lobdell *v.* Baker, 1 Metc. 193; 3 Ib. 469; Jones *v.* Crosthwaite, 17 Iowa, 393, and cases; 2 Pars. on Notes and Bills, 39; but no implied warranty of their *solvency:* Chitty on Bills, 245; 2 Parsons on Notes and Bills, 41; Epler *v.* Funk, 8 Pa. St. 468; Burgess *v.* Chapin, 5 R. I. 225. So there is an implied warranty that the instrument transferred has not been *paid*. And, generally, it is laid down by Mr. Parsons (2 Notes and Bills, ch. 2, p. 41), who follows and closely copies Mr. Chitty (Chitty on Bills, 247), that, "in all cases where the assignor" (we may add, whether by delivery or by indorsement, made "without recourse"), "of a bill or note *knows* it to be of no value, and the assignee receives it in good faith (not aware of the fact), paying a valuable consideration of any kind, the assignor may be compelled to repay or return the consideration thus received." And see Burgess *v.* Chapin, R. I. 225, which holds an assignor without indorsement to be liable upon the ground of fraud — the rule of *caveat emptor* otherwise applying.

But, in all such cases, the action is not upon the paper transferred, but against the vendor or transferrer upon and for the original consideration or its value, or for the fraud practiced; and the latter is "liable to the vendee," to use the language of Ames, C. J., in Aldrich *v.* Jackson, 5 R. I. 218, "for what he has received from him on the ground of failure of consideration." (Without quoting, see 2 Parsons on Notes and Bills, 37, and note; Kephart *v.* Butcher, 17 Iowa, 240; Chitty on Bills, 246, and authorities cited; Story on Notes, § 117 (5th ed.), and cases cited in notes 4 and 5; Welch *v.* Lindo, 7 Cranch, 159; Prettyman *v.* Short, 5 Harring. (Del.) 360; Eaton *v.* Mellus, 7 Gray, 566, holding that, in absence of fraud in the assignor, the assignee can only recover of him the amount of the consideration paid for the assignment, with interest).

If the foregoing views are correct, it follows that the plaintiff, holding simply the indorsement of the Moore note "without recourse," could not sue the Chesires on the indorsement. His remedy, if he could not make out a case upon the facts, would be a special one against Griffith, of whom he purchased the note, and to whom he made payment therefor. So Griffith's remedy would be against the Chesires. Under our statute, it may be that Griffith might *specially* assign his cause of action against Chesires to the plaintiff; but the mere indorsement of the note without recourse would not have this effect. Such an indorsement operates simply to transfer the title to the note — not an independent cause of action. The demurrer as to the first count of the petition was, beyond doubt, properly sustained as to the Chesires.

And if we are right in considering it as being intended as one upon the indorsement, and not as one intended and adapted to recover the consideration paid for the note, it was also properly sustained as to Griffith. Affirmed.

Indorsements in Blank — Reformation of Same — Liability of Indorser Thereon.

Farr *v.* Ricker, 46 Ohio St. 265 (21 N. E. 354).

MINSHALL, J. The suit below was upon the blank indorsement of a promissory note by the defendant, Ricker, to the plaintiff, Farr. The petition contained the necessary averments to show the liability of the defendant as an indorser; but, among other defenses, the defendant set up that at the time he made the indorsement there was a parol agreement between them that he was not to be liable as an indorser; in other words, that the plaintiff was to take the note without recourse. This was denied by the plaintiff, and, a jury having been waived, the case was tried to the court, which found for the plaintiff, and, after a motion for a new trial had been made and overruled, rendered judgment for the plaintiff. The judgment was reversed on a proceeding in error

by the circuit court, on the ground, as stated in the entry, that the court held "as incompetent, and excluded from consideration, defendant's verbal evidence, which tended to show that he wrote his name on the back of said note without recourse, or tended to show a verbal agreement between said parties that defendant was not to be held liable as an indorser on said note." Evidence to this effect had been introduced by the defendant which on motion was ruled out. The note had been purchased by the plaintiff of the defendant for value, in the course of business, and the indorsement was made to transfer the title. So that the case presents the question whether parol evidence is admissible for the purpose of varying the legal effect of such an indorsement. There has been some conflict in the decisions as to this, but it now seems that the decided weight of authority is against its admission for such purpose. Its admission has generally been placed on the ground that the contract of indorsement is an implied one, not in writing, and so not within the rule excluding parol evidence offered for the purpose of varying the terms of a written agreement. But this is not the generally received opinion, and is contrary to the usage and understanding of the commercial world. It is said by Justice Matthews, in Martin *v.* Cole, 104 U. S. 37: "The contract created by the indorsement and delivery of a negotiable note, even between the immediate parties to it, is a commercial contract, and is not in any proper sense a contract implied by the law, much less an inchoate or imperfect contract. It is an express contract, and is in writing, some of the terms of which, according to the custom of merchants and for the convenience of commerce, are usually omitted, but not the less on that account perfectly understood. All its terms are certain, fixed, and definite, and, when necessary, supplied by that common knowledge, based on universal custom, which has made it both safe and convenient to rest the rights and obligations of parties to such instruments upon an abbreviation. So that the mere name of an indorser, signed upon the back of a negotiable instrument, conveys and expresses his meaning and intention as fully and completely as if he had written out the customary obligation of his contract in full." And it was there held that parol evidence is not competent to contradict or vary the legal effect of such an indorsement; and it is also stated that the cases in support of the rule "are too numerous for citation." Regarding the indorsement, though in blank, as an abbreviated written agreement, all of whose terms are, by usage and custom, made definite and certain, such would seem to be the logical result of the previous decisions of this court. Thus it has been applied in a number of cases to the making of a note (Titus *v.* Kyle, 10 Ohio St. 445. Collins *v.* Insurance Co., 17 Ohio St. 215); and to the drawing of a bill (Cummings *v.* Kent, 44 Ohio St. 92; 4 N. E. Rep. 710); and also to the acceptance of a bill (Robinson *v.* Bank, 44 Ohio St. 441; 8 N. E. Rep. 583). There are some exceptions to the rule. It is competent for an indorser to show,

as against his indorsee, that they became parties to the paper for the accommodation of the maker, or some other party, though in so doing he may change his apparent liability to his indorsee. This is illustrated by the early case of Douglas *v.* Waddle, 1 Ohio, 413, and numerous cases elsewhere, on the ground that such evidence does not vary the contract, "but, admitting its efficacy, would show how the parties had agreed to bear the burden of it, if need were." Bigelow Cas. Bills & N. 169. It is also competent for an apparent indorser, as against his immediate indorsee or one with notice, to show that his indorsement was without consideration; for this is no more than may be done by a maker, drawer, or acceptor under like circumstances. Or he may show that his name was placed on the paper for a different purpose than to transfer the title to the indorsee. The case of Morris *v.* Faurot, 21 Ohio St. 155, cited and much relied on by the counsel for defendant in error, is of this class. That such was the ground of the decision is apparent from the facts and the language employed by the judge in delivering the opinion of the court. He says: "A blank indorsement which evidences a contract, the terms of which cannot be contradicted or varied by parol testimony, is one made in the usual course of business, for the purpose of transferring the title of or giving credit to the paper. The defense in this case was that no transfer of title was intended, nor was credit intended to be given this note by the transaction, but that it was paid and discharged by the makers through and by the plaintiff, who was acting for them and at their request," and that the defendant simply indorsed his name on the note to enable the plaintiff to show the makers that he had paid it. The case of Hudson *v.* Walcott, 39 Ohio St. 618, also falls within this distinction. The name of Burt, who was sought to be made liable as indorser, had, for the purpose of collection by the savings bank, been indorsed on the note some months before its transfer to Hudson, and the issue was whether this indorsement had been adopted in the transfer of the note to Hudson. Burt claimed that by the agreement Hudson was to take it without recourse, and that the omission to erase the indorsement was an oversight. It was held that he might do so. Morris *v.* Faurot is cited and relied on, which shows that the judge did not intend to announce, as the facts of the case did not require, any rule different from that applied in the former case.

A further exception is made, that is more apparent than real, in favor of the indorsee, by which he is permitted to show a parol waiver of demand and notice. The cases of Dye *v.* Scott, 35 Ohio St. 194, and the second branch of Hudson *v.* Walcott, supra, are of this character; and also McMonigal *v.* Brown, 45 Ohio St. 499; 15 N. E. Rep. 860. The exception is on the ground that demand and notice are not a part of the contract, but a mere step in the remedy, which may be waived by the indorser. Byles Bills (6th Amer. ed.), Sharswood's notes, 160; Bassen-

horst *v.* Wilby, 45 Ohio St. 333, 339; 13 N. E. Rep. 75; 1 Pars. Notes & B. 549. The limits fixed by these exceptions confine the rule to an indorsement made for value in the usual course of business for the purpose of transferring the paper or giving it credit; and within these limits the rule is general that a contract of indorsement as interpreted by mercantile law, though in blank, cannot be varied by parol evidence of what was then agreed on by the parties. The case of Bailey *v.* Stoneman, 41 Ohio St. 148, is claimed to be opposed to this. The indorsement sued on in that case had been made in performance of a previous contract for building a house. The builder had agreed to take the note secured by mortgage in part payment for his work. The house was built and the indorsement made according to the previous agreement. The plaintiff, a subsequent indorsee, knew the facts. The court held that, the indorsement being in blank, parol evidence of what was said by the parties in and about the transfer was properly admitted. If this case can be construed to hold that such evidence of a parol agreement made at the time of an indorsement for the purpose of varying its effect is admissible, it is contrary to the subsequent case of Cummings *v.* Kent, supra; for it is there held that such evidence is not competent for the purpose of varying the liability of a drawer of a bill, and the drawer of a bill is, according to mercantile law, the same as the indorser of a note, or, in other words, every indorser of a note is regarded as the drawer of a new bill. And, as Cummings *v.* Kent is the later case, the rule established by it should be followed until it is overruled. We are virtually asked to do so; but this we are not disposed to do, as it is supported by not only what seems to be the better reason, but also the greater weight of authority. Bigelow Cas. Bills & N. 168, § 3; Byles Bills (7th Amer. ed., Sharswood), 101, note 1; Whart. Ev., § 1059, note 2; Benjamin's Chalmer's Dig., art. 56; and cases cited in Cummings *v.* Kent, 44 Ohio St. 97; 4 N. E. Rep. 710; Castle *v.* Rickly, 44 Ohio St. 490; 9 N. E. Rep. 136. That an indorsement may be reformed in equity on the ground of accident, fraud, or mutual mistake, as any other written agreement, so as to make it conform to the real intention of the parties, will not admit of much doubt. In the case of McElwain *v.* Merchants' & Farmers' Bank, decided by this court at the January term, 1887, but not reported, in which the defendants below, who had been sued upon a note signed in their individual capacities, answered, by way of cross-petition, that by mutual mistake the note had been so signed, when by the agreement of the parties it should have been made the note of the association of which they were directors, and asked for a reformation, it was held that the action was appealable; which, under our practice, was simply a holding that the parties were entitled to the relief they asked, in case the averments were supported by proper proof. But such remedy must have been obtained, either by a suit for that purpose or by a cross-petition in action on the indorsement, before it can be relied on as a

ground of defense. In such case the issue is triable by the court, and must be sustained by clear and convincing proof, as in all similar cases, before the reformation can be had. This remedy affords a sufficient protection against any possible wrong that may result from the rule at law, and adequately protects the holder of negotiable paper. There was no averment of any mistake or fraud contained in the answer, and no reformation was asked; and the evidence introduced, and not considered by the court, was insufficient to warrant a reformation, had it been asked. It consisted of the evidence of the defendant contradicted by that of the plaintiff; so that, were we, under the liberal principles of our Code, to regard the answer as in the nature of a cross-petition for a reformation of the indorsement, which it is not, still the refusal of the court to consider the evidence could not be assigned as a ground of error, since, had it been considered, it would have been the duty of the court, by reason of the insufficiency of the evidence, to deny the relief; and it alone was the proper tribunal to consider it. Hence, in any view, there was no error to the prejudice of any substantial right of the party in the ruling of the court. Judgment of the circuit court reversed, and that of the common pleas affirmed.

Restrictive Indorsement — Cancellation of Same, Followed by Absolute Indorsement — Notice to Subsequent Holder.

People's Bank *v.* Jefferson Co. Sav. Bank, 106 Ala. 624 (17 So. 728).

Appeal from city court of Birmingham; W. W. Wilkerson, Judge.

Action of assumpsit by the People's Bank of Lewisburg against the Jefferson County Savings Bank. From a judgment for defendant, plaintiff appeals. Reserved.

Coleman, J. The appellant bank sued the defendant in assumpsit for money had and received. The evidence is without conflict, and we will state the facts substantially which gave rise to the demand. On the 17th day of March, 1893, R. A. Wilkes drew a check as follows:—

"$750.00. Birmingham, Ala., March 17th, 1893.

"At sight, pay to order of Beatty & Orr seven hundred and fifty dollars, value received, and charge to the account of

"R. A. Wilkes.

"To Tennessee Packing Co., Birmingham, Ala."

Written across the face of the draft was:—

"Accepted. Payable at Jefferson County Savings Bank, Birmingham, Ala. "Tenn. Pa'g Co.,

"By R. A. Wilkes."

It was indorsed as follows, with erasures:—

" Beatty & Orr."

~~" No. 519.~~

~~" Pay to the order of F. Porterfield Cas. for collection only for account Peoples Bank of Lewisburg Tenn.~~

~~R. A. McCord, Cash."~~

This indorsement, as erased, was followed by the following indorsement:—

" Pay Commercial Nat'l Bank, Nashville, Tenn., or order for account of Peoples Bank Lewisburg, Tenn.

" R. A. McCord, Cash."

" No. 17925.

" Pay to the order of Jeff. Co. Sav. Bk. for collection only for acct. " Commercial Nat'l Bank,

" Nashville, Tenn.

" F. Porterfield, Cash."

The draft was paid to the Jefferson County Savings Bank on March 25, 1893, and by that bank placed to the credit of the Commercial National Bank, and notice of the collection and credit mailed to the Commercial National Bank within banking hours on the same day. On the day of the payment of the draft in Birmingham,— the 25th of March,— the Commercial Bank, doing business in Nashville, Tenn., closed its doors, and ceased to do business. The Jefferson County Savings Bank had no notice of its failing condition until after the collection of the draft, and notice of the collection and credit had been mailed. At the time of its failure the Commercial Bank was indebted to the Jefferson County Savings Bank in excess of the amount collected and credited. The draft was sent by the Commercial Bank to the Jefferson County Savings Bank in a letter which stated that the draft was sent for collection and credit.

The question is whether the money, when collected, belonged to the plaintiff bank, of which fact the collecting bank had notice, or was it the money of the Commercial Bank, and, under the written authority contained in its letter, or the usage of the banks, did the collecting bank have authority to credit the amount collected in payment of the indebtedness due it from the Commercial Bank? The cashier of the plaintiff bank testified that plaintiff had an arrangement with the Commercial Bank with regard to drafts sent to it by plaintiff, to the effect that when the drafts were collected, and amounts reported, and placed to credit of plaintiff, the latter would draw for the amount, but not before it was reported collected; and that no report of the collection of the draft was ever made by the Commercial Bank, nor the amount placed to plaintiff's credit; that plaintiff bank never drew against the amount of the draft; that at no time was plaintiff bank indebted to the Commercial Bank; that it had been forwarded

simply for collection, and so entered on their books; and that plaintiff was the owner of the draft, and never parted with its title. Unless plaintiff's rights were lost or waived by virtue of the indorsements, or its agreement with the Commercial Bank, expressly or impliedly, the plaintiff, in our opinion, was entitled to recover. We attach no importance to the canceled indorsement. The indorsement and cancellation were made by plaintiff before the transmission of the draft for collection. The unerased indorsements determined the legal relations of the parties. The indorsement by plaintiff, "Pay Commercial National Bank or order for account of People's Bank of Lewisburg," according to all the authorities, gave notice that the paper was the property of the People's Bank, that it claimed the money due upon it, and that it was no longer negotiable paper. No one could purchase the instrument with this indorsement, and claim protection as an innocent purchaser against the true owner. Whosoever undertook to collect this paper thus indorsed, whether acting as the agent of the owner or the agent of the agent, knew that the money, when collected, ex aequo et bono, would belong to the owner of the paper. Any appropriation of it otherwise, without the consent of the owner, would be unauthorized. This we understand to be the distinction between the legal effect of a restricted indorsement, such as "for collection," or "on account of," and a general indorsement in blank, or "Pay to ——," without restrictive words. When the defendant bank received the draft for collection, and collected the money, it well knew, from the restricted indorsement, if there was no other agreement, that it belonged to the plaintiff, and not the Commercial Bank, and that the Commercial Bank had no title to it, nor any power to authorize the defendant bank to apply it or its proceeds to the payment of an indebtedness due it from the Commercial Bank. As between the owner and the collecting bank, the latter collected upon the terms and conditions expressed by the indorsement, irrespective of any understanding or agreement that may have existed between it and its principal, the agent of the owner. It could not acquire a right which its principal did not possess, and it knew its principal was a mere agent of the owner, for collection. No person or corporation has any authority to apply money or property received and held by its debtor as agent or upon trust, with knowledge of the fact, in satisfaction of the debts of such agent. There is no question of an innocent purchaser for value in the case.

It is contended for appellant that under the agreement and course of dealing between the plaintiff and its agent, the Commercial Bank of Nashville, as soon as the money was collected by the latter, the relation of debtor and creditor arose, and the ownership of the money vested in the Commercial Bank, and the collection of the money by the defendant and crediting it upon the indebtedness of the agent bank was, in law, the transmission of the money to the agent bank, as

much so as if actually placed in its vaults, and had the effect to create the relationship of debtor and creditor between plaintiff and the Commercial Bank. The plaintiff, by its restricted indorsement, gave notice to the Commercial Bank and the defendant that the draft, or the money when collected, belonged to it. No agreement between the Commercial Bank and the defendant, nor any method of bookkeeping nor of keeping accounts current, could divest the owner of its title to the draft of its proceeds. There are statements in some opinions of courts of high standing seemingly in conflict with our conclusion, but an examination of the facts of these cases will show the principle of law applied is not applicable to the present case. In the case of Bank *v.* Armstrong, 148 U. S. 50; 13 Sup. Ct. 533, where the indorsement was "For collection," Mr. Justice Brewer, delivering the opinion of the court, declared that, as to the drafts which had been forwarded by the Fidelity Bank for collection to its agents, and which were not collected until after notice of its insolvency, the collecting banks, in making collections, acted as the agents of the owner of the drafts, and not as the agents of the Fidelity Bank; that, as to drafts collected before the insolvency of the Fidelity Bank had been disclosed, and which had been credited by the subagents upon the drafts of the Fidelity Bank to them before notice of its insolvency, under the facts of the case, the collecting bank of subagent was not liable to the owner. The court agreed with the conclusions of the trial court, which held that "the collection had been fully completed," and that the credit to the Fidelity Bank "was the same as though the money had actually reached the vaults of the Fidelity Bank." The facts of the case as stated in the opinion showed that there was an agreement between the plaintiff and the Fidelity Bank that the latter was to remit the 1st, 11th, and 21st of each month. Collections intermediate these dates were, by the custom of banks and the understanding of the parties, to be mingled with the general funds of the Fidelity, and used in its business. By the arrangement as to intermediate collections, the relation of debtor and creditor existed. The Fidelity Bank became the owner of the money, and was a debtor to the plaintiff. We are of opinion that the court based the conclusion that the subagent was not liable to the plaintiff upon the fact that the money, when collected and credited under the arrangement made with the plaintiff, was the money of the Fidelity, and not the money of the plaintiff. It was the agreement between the plaintiff and its agent that remittances were to be made at stated periods only, and in the meantime the Fidelity Bank had the right to use the money in its business, which terminated the ownership of the plaintiff as soon as the money was collected by the Fidelity, and created the relationship of debtor and creditor. In discussing the question of collections by a subagent before and after "avowed insolvency" of the principal agent, the court was of opinion that the fact of collection by a subagent before notice of insolvency of its prin-

cipal was "not decisive" of its liability to the owner, and the decision was rested mainly upon the owner and its agent, by which the relation of debtor and creditor was established between the days of remittances. In the case of White *v.* Bank, 102 U. S. 658, the indorsement was, "Pay S. V. White or order for account of," etc. The court declared that the "indorsement is without ambiguity, and needs no explanation, either by parol proof or resort to usage. The plain meaning of it is that the acceptor of the draft is to pay it to the indorsee for the use of the indorser. The indorsee is to receive it on account of the indorser. It does not purport to transfer the title of the paper, or the ownership of the money when received. Both these remain, by the reasonable and almost necessary meaning of the language, in the indorser." In the case of Bank *v.* Hubbell, 117 N. Y. 384, 396; 22 N. E. 1031, the same distinction and rule is declared as held in 148 U. S., 13 Sup. Ct., supra. The court says: "The firm, by the arrangement, had the right to retain the moneys, and to remit weekly; and, of course, from one week to another, it had the right to use the money, and the plaintiff relied upon the credit of the firm for such time as it had the right to retain the money." In the case of Mechanics' Bank *v.* Valley Packing Co., 70 Mo. 643, the indorsement was "Pay to D. or order for collection for account of C." The court held "that the restrictive indorsement destroyed the negotiability of the bill, and operated as a mere authority to receive the proceeds for the use of the indorser." In the case of Dorchester & Milton Bank *v.* New England Bank, 1 Cush. 177, the distinction between an indorsement in blank and a restrictive indorsement is fully declared. Manufacturers' Nat. Bank *v.* Continental Bank, 12 Am. St. Rep. 598, 148 Mass. 553, 20 N. E. 193; Freeman's Nat. Bank *v.* National Tube Works, 21 Am. St. Rep. 461, 151 Mass. 413, 24 N. E. 779.

We are of opinion the distinction is clear, and the rule sound. Without it, ownership of the draft and money would be divested against the express contract of the indorsement, and without fault. The case of Bank *v.* Weiss, 67 Tex. 331, 3 S. W. 299, lays down the broad rule that, where a bank or person collects money upon a draft sent to it by the bank to which it was indorsed for collection by the owner, with a restricted indorsement, the agent collecting the money holds it in trust for the owner, and has no authority to apply it to the payment of any indebtedness due from the forwarding bank, and that without reference to the question of notice of its insolvency. The agreement between the plaintiff in the case at bar and the Commercial Bank did not authorize the latter to use the plaintiff's money at any time in its business. As soon as collected, it was the duty of the Commercial Bank to notify the plaintiff of the collection, and then plaintiff would draw it out. According to the facts of the case, the collection was never credited to plaintiff, and the Commercial

Bank ceased to do business, and its agency terminated by insolvency before its contract with plaintiff was completed. We are of opinion under the facts of this case the plaintiff was entitled to recover, and a judgment will be here rendered to that effect. Reversed and rendered.

Irregular Indorsement for Accommodation — Restrictive Indorsement for Collection — Such Indorsee Agent of Indorser.

Blakeslee *v.* Hewitt, 76 Wis. 341 (44 N. W. 1105).

Appeal from circuit court, Clark county; A. W. Newman, Judge.

Action by Maria S Blakeslee against James Hewitt and others, on a promissory note. From the judgment for plaintiff, defendants appeal.

Cole, C. J. The undisputed evidence in this case shows that all the indorsers signed the note upon which suit is brought before its delivery to the payee, to give credit to the maker, Colburn. This is the effect of the testimony of Ring and Youmans. The former says, in substance, that it was understood that the indorsers should indorse the note to give Colburn credit for the purchase of the mill property, and that he indorsed as he agreed to. Youmans says he knew Colburn's signature and the other signatures on the back of the note; that they were the signatures of the defendants Hewitt, Archer, Ring, and Youmans. The reason they signed as indorsers was as an accommodation to give credit to Colburn. Under these circumstances, they became liable to the payee as indorsers. That is the rule laid down by this court in Cady *v.* Shepard, 12 Wis. 639. It has been followed in other cases. Davis *v.* Barron, 13 Wis. 254; Snyder *v.* Wright, Id. 689; King *v.* Ritchie, 18 Wis. 555; Frederick *v.* Winans, 51 Wis. 472, 8 N. W. Rep. 301. It is idle to say, in the face of this testimony, which is undisputed, that there is no proof to show, when Hewitt and Archer indorsed the note, whether it was before or after delivery to the payee, or that they indorsed it to give credit to the maker. The testimony is clear and satisfactory that they and the other indorsers indorsed it before delivery for the very purpose of giving credit to the maker, and they should be held to their contract. The assumption that they might have signed as second indorsers on the responsibility of the payee, is in conflict with all the facts proven.

Another objection taken is that there was no proof of a proper demand of payment and notice of dishonor given. The note was made payable at the Clark County Bank at Neillsville. The cashier of that bank, who was a notary public, duly demanded payment of the note at the bank, and protested the same for non-payment, and gave immediate notice to each of the indorsers. It appears that the note had been

left with a bank at Sparta, doubtless for collection, and was sent by the latter bank to the Clark County Bank for the same purpose. It is said that it did not appear that the cashier of the Clark County Bank had any authority from the payee to present the note for payment. But the facts show that there was an implied authority for the Sparta bank to send the note to the Clark County Bank for collection, as was done. This authority is implied from the facts of the case, and it was so decided in Stacy *v.* Bank, 12 Wis. 629. The Clark County Bank was unquestionably the agent of the Sparta Bank to collect the note for the owner thereof. Marine Bank *v.* Fulton Bank, 2 Wall. 252; Ward *v.* Smith, 7 Wall. 447. Where a bank is designated for the payment of a note, the common usage is for the holder to send it to such bank for collection, and the party bound for its payment can call and take it up. Under such circumstances, the bank becomes the agent of the payee to receive payment. Ward *v.* Smith, supra. This doctrine is elementary, and no authority need be cited to sustain it.

But it is further insisted the court erred in excluding the evidence offered to show when the action was commenced that Ring and Archer had offsets against Chauncey Blakeslee, in the way of unpaid notes. The ruling of the court in excluding this evidence was manifestly correct, for several reasons. In the first place, no set-off was pleaded in the answer, so there was no foundation laid for such proof. Besides, Chauncey Blakeslee was not a party to the suit. The note was made payable to Mari- S. Blakeslee, presumably the holder and owner, and in whose name the action was brought. It is suggested that the mill property, which was the consideration of the note, was the property of Chauncey Blakeslee. But what if it was? Non constat but Mrs. Blakeslee was the real owner of the note for a valuable consideration. She may have advanced money to her husband for it, or he may have given it to her. At all events she is the party to the record, and prima facie is the real owner, who is entitled to recover it. There was no question in the case to submit to the jury, and the circuit judge properly directed a verdict for the plaintiff. The judgment of the circuit court is affirmed.

CHAPTER IX.

THE RIGHTS OF BONA FIDE HOLDERS.

SECTION 93. Who is a *bona fide* holder.
94. What defenses will and will not prevail against *bona fide* holders — General statement.
95. Instruments void for want of delivery.
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110. Transfer on last day of grace, or day of maturity.
111. Actual and constructive notice of defenses.
112. Notice by *lis pendens.*
113. Burden of proof as to *bona fide* ownership.

§ 93. **Who is a bona fide holder.**— At the present day, the chief distinction of negotiable paper is the peculiar and superior title which may be acquired in such paper by one who is known as a *bona fide* holder; and it is this which makes the negotiable bill, note or check, so valuable an aid to exchange. Tersely stated, the *bona fide* holder takes such a bill or note, free from defenses not appearing on the face of the paper; and he may recover on it, notwithstanding such defenses might have been set up by the

primary obligor, if the action had been brought by the original payee, or by a subsequent transferee, who is not a *bona fide* holder.

The general rule may be stated thus: A holder of negotiable paper who has taken it (1) *bona fide*, (2) without notice of dishonor and existing defenses, (3) for a valuable consideration, (4) in the usual course of business, (5) and before maturity, can successfully enforce the obligation of the bill or note against the acceptor, maker, drawer and prior indorsers, notwithstanding the existence of defenses, not appearing on the face of the paper, which might be set up against some prior obligee or holder.

But in explaining the doctrine of *bona fide* ownership, as a superior claim to the enforcement of a bill or note, against which a good defense could be set up by the primary obligor if the action had been brought by the payee or some prior indorsee, it must always be remembered that *bona fide* ownership is an incident of negotiable paper, which inures to the benefit of subsequent transferees, as well as to the person who can in his own person claim to be in every respect a *bona fide* holder. The *bona fide* holder can transfer just as good a title as he has himself, even to one who cannot himself claim to be a *bona fide* holder. So that if, at any point in the chain of transfers from the payee to the present holder, a *bona fide* ownership can be established, the maker of a note, acceptor or drawer of a bill or earlier indorser, cannot resist his liability on such note or bill in an action by the present holder; even though such holder cannot in his own person prove a *bona fide* ownership, because he was not a holder for value, or he took the paper with notice or after maturity; or because some other element of the negotiable character is wanting in his own person.[1] The only exception to this general rule is to be found in the person of a prior indorsee or holder, who cannot, in his own person, claim to be a *bona fide* holder. Such prior indorsee or

[1] Langford *v.* Varner, 65 Mo. App. 370; Jones *v.* Wiesen (Neb. '97), 69 N. W. 762.

transferee cannot, by a transfer of such bill or note to one who can fill all the requirements of *bona fide* ownership, and by a transfer to himself, acquire the protection of *bona fide* ownership in the character of a later indorsee or transferee.[1]

Before considering in detail who is a *bona fide* holder, it is necessary to determine—

§ 94. **What defense will and will not prevail against bona fide holders — General Statement.**— It is customary to say that the *bona fide* holder takes the negotiable paper free from all *equitable defenses;* meaning thereby those defenses *which do not appear on the face of the paper, and which do not absolutely negative the existence of the paper as a monetary obligation.* For example, the *bona fide* holder can enforce a negotiable bill or note, although it was originally negotiated without consideration,[2] or where it was based upon an illegal consideration, except where the consideration is made illegal by statute, and the statute expressly declares all contracts, based upon such consideration, to be absolutely void.[3] The *bona fide* holder can enforce the bill or note, although it had its inception in fraud,[4] or where the bill or note was paid,[5] or any party to the paper released[6] before maturity and without cancellation or surrender of

[1] Fuller *v.* Goodnow, 62 Minn. 163; 64 N. W. 161; Hatch *v.* Johnson Loan & Trust Co. 79 Fed. 828; Braxton *v.* Braxton, 20 D. C. 355; Weems *v.* Shaughnessy, 70 Hun, 175. See *post*, § 107.

[2] See *ante*, § 51.

[3] See *ante* § 51.

[4] Goodman *v.* Simonds, 20 How. 343; Brown *v.* Spofford, 94 U. S. 474; Second Nat. Bank *v.* Hewitt (N. J. '96), 34 A. 988; Hyman *v.* Am. Electr. Forge Co., 18 Misc. Rep. 381 (41 N. Y. S. 655); Central Bank *v.* Hammett, 50 N. Y. 158; Grant *v.* Walsh, 145 N. Y. 102 (40 N. E. 209); Cristy *v.* Campau (Mich. '96), 65 N. W. 12; Wayne Agricultural Co. *v.* Cardell, 73 Ind. 555; Highsmith *v.* Martin, 99 Ga. 92 (24 S. E. 865); Taylor *v.* Cribb (Ga. '97), 26 S. E. 468; Sturges *v.* Miller, 80 Ill. 241; Second Nat. Bank *v.* Morgan, 165 Pa. St. 199 (30 A. 957); Lanier *v.* Union Mtge. &c. Tr. Co. (Ark. '97), 40 S. W. 466.

[5] Small *v.* Clarke, 51 Cal. 227.

[6] Palmer *v.* Marshall, 60 Ill. 269; Schoen *v.* Houghton, 50 Cal. 528.

the paper. These defenses do not appear on the face of the paper, and yet do not negative the existence of, at least a *prima facie*, legal obligation.

On the other hand, where the defense shows that there never was a binding obligation on the maker of the note, or on the drawer or acceptor of a bill; — in other words, that some one of the essentials of a valid contract is wanting, so that for that reason what purports to be a bill or note is not one,— the defense will prevail against a *bona fide* holder, as well as the original payee.

It has already been explained that where a bill or note is based upon a consideration, which is declared illegal by statute, and the statute declares all such contracts to be *absolutely void*, such an instrument cannot be sued on by a *bona fide* holder.[1] Competency of the parties is essential to the validity of a bill or note, it matters not into whose hands it may come. Hence, if the maker or other primary obligor of a negotiable instrument is incapacitated by infancy, insanity, or coverture, the paper is void or voidable even in the hands of a *bona fide* holder.[2] Where the obligor is a private corporation, and the bill or note is issued *ultra vires;* whether such paper is good in the hands of a *bona fide* holder, seems to depend upon the possession by such corporation of the general power to issue bills and notes. If it has this general power, the particular bill or note can be enforced against it by a *bona fide* holder, even though it was given in settlement of an *ultra vires* transaction. But if the corporation is denied all power to bind itself by the issue of a negotiable instrument, it will, of course, be void even in the hands of a *bona fide* holder.[3]

If an instrument be a forgery, it is manifest that a *bona fide* holder can acquire no rights against those parties as to whom it is a forgery.[4] But the transferrer or indorser of a forged bill or note will of course be liable to the *bona fide*

[1] See *ante*, § 51.

[2] See *ante*, §§ 33–36.

[3] See *ante*, § 43.

[4] See *post*, chapter on Forgery and Alterations.

holder, as has been explained in the two proceding chapters.[1]

§ 95. **Instruments void for want of delivery.**— Delivery is the act which gives life to the negotiable instrument, and until it has been delivered, no cause of action arises thereon, as between the immediate parties to the paper.[2] But the authorities are not agreed as to the circumstances under which, if at all, a *bona fide* holder can recover on a bill a note, which has not been delivered to a payee or third person for any purpose. It is agreed that where the paper is delivered in escrow, the *bona fide* holder, who gets possession, before the condition of the escrow has been performed, gets a good title to the paper.[3] But where there has been no delivery of the paper for any purpose, and it has been taken away from him without his consent, and trans ferred to a *bona fide* holder; some of the cases maintain that the maker or drawer is not liable thereon, whether the paper was complete or incomplete, unless it can be shown that his culpable negligence enabled another to get possession of the undelivered instrument.[4] But it has been held to be culpable negligence for one to sign an otherwise complete negotiable bill or note, and to lay it away in some box or drawer, although under lock and key; and if it be stolen under such circumstances, or it is taken away from the obligor by force, and it passes into the hand of a *bona fide* holder, such holder can recover on the paper.[5] But where the instrument is incomplete when it is stolen, the authorities seem to be agreed, that a *bona fide* holder can-

[1] See *ante*, §§ 76, 84.

[2] See *ante*, § 26.

[3] See *ante*, § 27.

[4] Eastman *v.* Shaw, 65 N. Y. 522; Burson *v.* Huntington, 21 Mich. 415 (4 Am. Rep. 497).

[5] Worcester Co. Bank *v.* Dorchester &c. Bank, 10 Cush. 488 (57 Am. Dec. 120); Salander *v.* Lockwood, 66 Ind. 285; Clarke *v.* Johnson, 54 Ill. 296 (in this case, the note was snatched from the maker's hands, before he had added an intended condition); Kinyon *v.* Wohlford, 17 Minn. 239 (10 Am. Rep. 165).

not get title by indorsement or transfer from the thief after its completion by the latter.[1]

The same principles control, where the owner of a negotiable bill or note intrusts it to the possession of another and he fraudulently negotiates it to a *bona fide* holder. The latter acquires a good title to the paper.[2]

It must, however, be borne in mind that where a paper is payable to order, no one can be a *bona fide* holder, unless the paper has been indorsed by the one to whose order it is payable, either to the holder or in blank. The possibility of transfer of a stolen bill or note to a *bona fide* holder can arise only when it is payable to bearer, indorsed in blank, or when the payee or indorsee is the thief.

§ 96. **Blank instruments delivered to agent and filled up in violation of instructions.** — If one should execute a bill or note in blank, and deliver the same to an agent without instructions to fill the blanks in accordance with the directions given; and this agent, in violation of these instructions, should vary the terms and conditions of the intended paper, or he should divert it from the intended purpose; the paper would be a binding obligation in the hands of a *bona fide* holder, and the maker or drawer cannot defend a suit on the altered or diverted note or bill, on the general ground, that having reposed confidence in the agent, he should bear the loss occasioned by the agent's breach of confidence or violation of instructions, rather than that such loss be thrown upon a *bona fide* holder. As a general rule, the paper as completed by the agent will be binding upon the maker or drawer, as against a *bona fide* holder.[3] But in every case in which the *bona*

[1] Ledwich *v.* McKim, 53 N. Y. 307; Redlick *v.* Doll, 54 N. Y. 234 (13 Am. Rep. 573); Bazendale *v.* Bennett, L. R. 3 Q. B. 527. But see Clarke *v.* Johnson, 54 Ill. 296.

[2] Halsted *v.* Colvin, 51 N. J. Eq. 387 (26 A. 928).

[3] Michigan Bank *v.* Eldred, 9 Wall. 544; National Exchange Bank *v.* White, 30 Fed. 412; Bank of Pittsburg *v.* Neal, 22 How. 96; Market &

fide holder is held to be entitled to recover on an instrument which has been filled up by an agent in violation of instructions, it will be found that the unauthorized additions or insertions conform in character with the object and purpose of the blank instrument. If the additional clause or stipulation is not customarily inserted in a bill or note, the holder is charged with notice of its unusual character, and he is put to his inquiry to ascertain whether the agent is authorized to insert the unusual provision, whenever he knows that the paper has been completed by an agent.[1] And in all cases, the holder must show that he took the paper, which had been wrongfully completed by the agent, in good faith, for value and without notice of the violation of instructions by such agent. It has been held that where the holder knows that the instrument has been signed in blank, and its completion has been intrusted to an agent, he is charged with the duty of inquiring into the limitations of the agent's authority.[2] But the better opinion seems to be that he is permitted to presume that the agent has not exceeded his authority, as long as the paper does not contain any unusual or inconsistent provisions.[3]

Fulton N. Bk. *v.* Sargent, 85 Me. 349 (27 A. 192); Chase Nat. Bank *v.* Faurot, 149 N. Y. 532 (44 N. E. 164); Am. Exch. Nat. Bank *v.* N. Y. Belting &c. Co., 148 N. Y. 698 (43 N. E. 163; Androscoggin Bank *v.* Kimball, 10 Cush. 373; Humphrey *v.* Finch, 97 N. C. 303 (1 G. E. 870); Geddes *v.* Blackmore, 132 Ind. 551 (32 N. E. 567); Snyder *v.* Van Doren, 46 Wis. 602 (32 Am. Rep. 739); Weston *v.* Myers, 33 Ill. 424; Henderson *v.* Bondurant, 39 Mo. 369 (93 Am. Dec. 281); Joseph *v.* National Bank, 17 Kan. 256; Tabor *v.* Merchants' Nat. Bank, 48 Ark. 454 (3 S. W. 805); Shryver *v.* Hawkes, 22 Ohio St. 308.

[1] Angle *v.* N. W. Mut. Ins. Co., 92 U. S. 331; McGrath *v.* Clark, 56 N. Y. 34 (15 Am. Rep. 372); McCoy *v.* Lockwood, 71 Ind. 319; Ivory *v.* Michael, 33 Mo. 398.

[2] Van Duzer *v.* Howe, 21 N. Y. 531; Hatch *v.* Searles, 2 Sm. & Giff. 147; First Nat. Bank *v.* Compo. Board Mfg. Co., 61 Minn. 274; 63 N. W. 731; National Bank of St. Joseph *v.* Dakin, 54 Kan. 656 (39 P. 180); Bank of Topeka *v.* Nelson (Kan. '97), 49 P. 155, where the bill was negotiated without additional signatures.

[3] See Angle *v.* N. W. Ins. Co., 92 U. S. 331; Snyder *v.* Van Doren, 46 Wis. 602 (32 Am. Rep. 739); McCoy *v.* Lockwood, 71 Ind. 319. As to the effect of an alteration of a completed instrument, as against a *bona fide* holder, see *post*, chapter on Forgeries and Alterations.

§ 97. **Bill or note written over a blank signature.**— But a distinction should be recognized between signing a blank form of a bill or note, and intrusting the same to a stranger, whether it is given with instructions to fill, or without such instructions, on the one hand; and on the other hand, writing one's name on a blank piece of paper, over which a third person, having obtained possession of it for some other purpose, writes out a promissory note or bill of exchange. As has been seen, in the former case, the *bona fide* holder has the right to presume that the agent, to whom the blank bill or note has been delivered, had the authority to fill it up and negotiate it; and that he filled it up and negotiated it in accordance with his instructions. But where one has merely written his name on a blank piece of paper — it matters not for what purpose, if it be not for the purpose of signing some kind of contract — and some one, to whom the paper with the signature has been given, writes out over the signature a promissory note or bill of exchange, there is neither an implied authority to bind the party so writing his name by such a bill or note, nor negligence in intrusting the signature to a third person, upon which can rest the claim that such a person is liable to a *bona fide* holder as maker, drawer, or acceptor of such a note or bill. In such cases, the *bona fide* holder cannot recover.[1]

§ 98. **Bills or notes executed by mistake or under false representations.**— Mistake and false representations are equitable defenses, which do not negative the existence of a *prima facie* legal contract; and hence, one would naturally suppose that these would not be good defenses in an action on a note or bill brought against a maker or a drawer by a *bona fide* holder; and, undoubtedly, this general prop-

[1] First Nat. Bank *v.* Zeims, 93 Iowa, 140 (61 N. W. 483); Cline *v.* Guthrie, 42 Ind. 227 (13 Am. Rep. 357); Nance *v.* Lary, 5 Ala. 370 (in this case, one signed his name to a blank paper, with instruction to write over it a bond; held not liable on note written instead); Walker *v.* Eberly, 29 Wis. 194.

osition is well settled.[1] It does happen, sometimes, that ignorant or careless persons are induced to sign a contract, under a false representation as to its character, which is in fact a bill or note. The general drift of authority makes in this connection a distinction between persons who can read the paper and those who cannot. Where one is generally illiterate, or he is unable to read the language in which the contract is written, proof that he signed the contract under the false representation that it was something else than a bill or note, will avoid such bill or note so signed even in the hands of a *bona fide* holder.[2] But where one is able to read for himself, he is guilty of negligence if he permits the paper to be read to him, or is satisfied with an oral explanation of its contents and character. If he has been misled or deceived, under such circumstances, he must suffer the loss, and he cannot defend himself against the claims of a *bona fide* holder.[3]

In some of the Western States, however, it has been held that false representations of the character of the instrument signed will be a good defense to an action on the same by a *bona fide* holder, if there appears to have been no negligence, short of confidence in the representations of the payee; and in Illinois, such false representations are declared by statute to be a good defense to an action on a bill or note, even against a *bona fide* holder.[4]

[1] See *ante*, § 94.

[2] Putnam *v.* Sullivan, 4 Mass. 45 (3 Am. Dec. 206); Chapman *v.* Rose, 56 N. Y. 137 (15 Am. Rep. 401); Schuylkill Co. *v.* Copley, 67 Pa. St. 386 (5 Am. Rep. 441); Van Brunt *v.* Singley, 85 Ill. 281; Fayette Co. Sav. Bank *v.* Steffes, 54 Iowa, 214 (6 N. W. 267); Kalamazoo Nat. Bank *v.* Clark, 523 Mo. App. 59 (old and feeble).

[3] Chapman *v.* Rose, 56 (15 Am. Rep. 401); Ruddell *v.* Dillman, 73 Ind. 518 (37 Am. Rep. 152) Bank *v.* Johns, 22 W. Va. 520; Brooks *v.* Matthews, 78 Ga. 739 (3 S. E. 627); Ross *v.* Doland, 29 Ohio St. 473; Hopkins *v.* Hawkeye Ins. Co., 57 Iowa, 203 (10 N. W. 605); Carpenter *v.* First Nat. Bank, 119 Ill. 352 (10 N. E. 18); Shirts *v.* Overjohn, 60 Mo. 305.

[4] Hubbard *v.* Rankin, 71 Ill. 129; Auten *v.* Gruner, 90 Ill. 300; Gibbs *v.* Linabury, 22 Mich. 479 (7 Am. Rep. 675); Butler *v.* Karns, 39 Wis. 61; Palmer *v.* Sargent, 5 Neb. 223; Green *v.* Wilkie (Iowa, '96), 66 N. W. 1046.

§ 99. **Bills and notes executed under duress.**— It is doubtful whether a *bona fide* holder can recover on a bill or note, whose execution has been procured by duress; and the authorities are not agreed. Some of the cases, holding to the principle, that a contract executed under duress is voidable only, maintain that duress is not a good defense against a *bona fide* holder.[1] Other cases, on the principle that where there is duress there has been no exercise of will power and hence no intentional delivery of the bill or note, have held that the *bona fide* holder cannot maintain action on such a bill or note.[2]

As a general rule, only those persons who have signed a contract under duress may set up the defense of duress. But it has been held that where a surety or joint obligor takes the paper without notice of the duress, he may defend any suit brought against him on the paper, at least as against the immediate parties.[3] And the same rule has been followed in the case of an accommodation indorser.[4]

§ 100. **Estoppel as affecting defenses against bona fide holders.**— If the purchaser of a bill or note should, for the purpose of allaying his suspicions as to the validity of the paper, make inquiries of any party or parties to the instrument before completing the purchase ; and these parties should give him assurances that the bill or note was valid, those who gave him such assurances would be estopped from setting up defenses in any action brought against them on the instrument; at least in any case where they either knew or should have known at the time of the existence of such a defense, but not where the defense was discovered afterwards.[5]

[1] Clarke *v.* Pease, 41 Vt. 414; Griffith *v.* Sitgreaves, 90 Pa. St. 161; Hogan *v.* Moore, 48 Ga. 156; Duncan *v.* Scott, 1 Camp. 100; Farmers &c. Bank *v.* Butler, 48 Mich. 192; Peckham *v.* Hendren, 76 Ind. 46.

[2] Loomis *v.* Ruck, 56 N. Y. 462; 1 Daniel Negot. Inst., §§ 857, 858.

[3] Hazard *v.* Griswold, 21 Fed. 178; Harris *v.* Carmody, 131 Mass. 51 (41 Am. Rep. 188); Coffelt *v.* Wise, 62 Ind. 451; Osborn *v.* Robbins, 36 N. Y. 365.

[4] Griffith *v.* Sitgreaves, 90 Pa. St. 161.

[5] Tobey *v.* Chipman, 13 Allen, 123; Lynch *v.* Kennedy, 34 N. Y. 151; Fleischman *v.* Stern, 90 N. Y. 110; Woodruff *v.* Munroe, 33 Ind. 146;

There is a difference of opinion, however, whether such an assurance would work an estoppel, where it is made in the form of a certificate, attached to the instrument by the primary obligors at its inception. It has been held that such a certificate would work an estoppel [1] and, also, that it would not.[2]

Of course, the ordinary principles of estoppel apply in this case; so that, in order that the *bona fide* holder may be protected thereby, he must show that the representation was made before the purchase, and that he relied upon it, in making the purchase; [3] and, in an action on the estoppel, the holder can only recover the consideration he paid, *plus* interest, and not the face value of the instrument.[4]

§ 101. **What is meant by bona fide.** — It has been very frequently stated that, in order that the holder of a bill or note may claim the right to protection from the defenses which do not appear on the face of the instrument, he must show that he took the paper in good faith. *Mala fides* would deprive him of this protection. He must be a *bona fide* holder. Two constructions have been placed upon this requirement of good faith. One rule is that to be a *bona fide* holder, the indorser or transferee must have used due diligence in inquiring into any suspicious circumstances which may have surrounded the instrument or its negotiation, of which he became cognizant at the time. And if such an inquiry would have led to the discovery of the defense, he cannot claim to be a *bona fide* holder.[5] But

Reedy *v.* Brunner, 60 Ga. 107; Hefner *v.* Dawson, 63 Ill. 403 (14 Am. Rep. 123); Workman *v.* Wright, 30 Ohio St. 405 (31 Am. Rep. 546); Rose *v.* Hurley, 39 Ind. 77; Menaugh *v.* Chandler, 89 Ind. 94.

[1] Insurance Co. *v.* Bruce, 95 U. S. 328; Bank of Rome *v.* Rome, 19 N. Y. 20 (75 Am. Dec. 272); Clark *v.* Sisson, 22 N. Y. 312.

[2] Jaqua *v.* Montgomery, 33 Ind. 36 (5 Am. Rep. 168).

[3] Crossan *v.* May, 68 Ind. 242; Sackett *v.* Kellar, 22 Ohio St. 554; Moore *v.* Robinson, 62 Ala. 537; Watson *v.* Hoag, 40 Iowa, 143.

[4] Campbell *v.* Nichols, 33 N. J. L. 81.

[5] Sanford *v.* Norton, 17 Vt. 285; Merritt *v.* Duncan, 7 Heisk. 156 (19 Am. Rep. 612); Marsh *v.* Small, 3 La. Ann. 402 (48 Am. Dec. 452); Adkins *v.* Blake, 2 J. J. Marsh. 40.

the great weight of authority in this country, as well as reason, supports the contrary doctrine, that the *bona fide* character of a holder can be destroyed only by proof of participation in or actual knowledge of the fraudulent or illegal character of the instrument.[1]

§ 102. **Bona fide holder must be a holder for value.**— One cannot in his own character claim to be a *bona fide* holder of a bill or note, unless he can show that he has paid a valuable consideration for its transfer to him. The courts do not always express the requirement in the same way, but they are agreed that the consideration must be substantial. It must have a substantial value, although not necessarily adequate. But a consideration may be substantial and even adequate, although it be less than the face value of the bill or note, if it approximately represents its market value.

Several legal questions may, however, arise, where the consideration paid is less than the face value. They are the subjects of the three succeeding sections.[2]

§ 103. **When inadequacy of price constructive notice of fraud.**— If the price paid for the transfer of a bill or note be grossly inadequate, *i. e.*, it is far below its real market value; it is undoubtedly true that the purchaser is thereby charged with constructive notice of the fraudulent or defective title of the vendor, or of the existence of some

[1] Bank of Pittsburg *v.* Neal, 22 How. 96; Swift *v.* Smith, 102 U. S. 445; Wing *v.* Ford, 89 Me. 140 (35 A. 1023); Smith *v.* Livingston, 111 Mass. 342; Stimson *v.* Whitney, 130 Mass. 591; Chapman *v.* Rose, 56 N. Y. 137 (15 Am. Rep. 401); Seybel *v.* Nat. Currency Bank, 54 N. Y. 288 (13 Am. Rep. 583); Craft's Appeal, 42 Conn. 146; Hamilton *v.* Vought, 34 N. J. L. 187; Second Nat. Bank *v.* Morgan, 165 Pa. St. 199 (30 A. 957); Lancaster Nat. Bank *v.* Garber, 178 Pa. St. 91 (35 A. 848); Walker *v.* Kee, 14 S. C. 142; Murray *v.* Beckwith, 81 Ill. 43; Pond *v.* Waterloo Agr. Works, 50 Iowa, 596; Howzy *v.* Eppinger, 34 Mich. 29; Central Nat. Bank *v.* Pipkin, 66 Mo. App. 592; Hamilton *v.* Marks, 63 Mo. 167; Kelley *v.* Whitney, 45 Wis. 110 (30 Am. Rep. 697); Johnson *v.* Way, 27 Ohio St. 374; Brothers *v.* Bank of Kankana, 84 Wis. 381 (54 N. W. 786).

[2] As to the sufficiency of consideration in general, to make one a *bona fide* holder, see generally *ante*, chapter V.

defense to the liability thereon of the primary obligors and prior indorsers.[1]

But every price, which is less than the face value of the bill or note, is not necessarily inadequate or unsubstantial. Only that price is inadequate which falls below the market value. One-half the face value may, under some circumstances, be a grossly inadequate price; while under altered circumstances it may be greatly in excess of the real market value of the paper. Each case must therefore stand on its own merits; and where it can be shown that the price paid approximates reasonably the market value of the paper, there is no constructive notice of fraud or other equitable defenses, which would take from the purchaser the protection due to a *bona fide* holder.[2]

§ 104. **Inadequacy of price for indorsement as effected by laws against usury.**— In many of the States, statutes are to be found which declare the exaction of more than a certain rate of interest for loans of money to be usurious and illegal, and impose various penalties for infractions of the statute; and in a few cases, the instrument which is based on an usurious contract is declared to be absolutely void, even as against *bona fide* holders. Where the charge of usury is brought against the original parties to the bill or note, there can be no question of the validity of the charge, where it is shown that an usurious rate of interest has been exacted, whether it takes the form of interest to accrue in the future, or it is paid by way of discount from the face of the paper. But the difficult question to be determined in this connection is,

[1] Gould *v.* Stevens, 43 Vt. 125 (5 Am. Rep. 265); Tod *v.* Wick, 36 Ohio St. 370; Auten *v.* Gruner, 90 Ill. 300; First Nat. Bank *v.* Wade, Iowa (63 N. W. 345); Chouteau *v.* Allen, 70 Mo. 290; Dewitt *v.* Perkins, 22 Wis. 451; United States Nat. Bank *v.* McNair, 116 N. C. 550 (21 S. E. 389); Coliger *v.* Francis, 2 Baxter, 42; Hereth *v.* Merchants' Nat. Bank, 34 Ind. 380.

[2] Phelan *v.* Moss, 67 Pa. St. 59 (5 Am. Rep. 402); State Bank *v.* McCoy, 69 Pa. St. 204 (8 Am. Rep. 246); Bailey *v.* Smith, 14 Ohio St. 396 (84 Am. Dec. 385); Cannon *v.* Canfield, 11 Neb. 506 (9 N. W. 693); Irby *v.* Blain, 31 Kan. 716 (3 P. 499).

whether the transfer of a bill or note by a payee or indorsee, for a sum less than the face value of the paper, is usurious, where the difference in amount between the face value and the price paid is more than the lawful rate of discount.

Where an indorsee takes the bill or note on the indorsement of the payee, when he knows that the payee is an accommodation indorser, the transaction will be usurious, if the discount from the face value is greater than the lawful maximum rate of interest.[1] But where the payee is himself a holder for value, or where the indorsee does not know that he is an accommodation indorser, the transfer constitutes a sale of an existing obligation; and whether in such a case the law against usury applies is answered differently by the different courts. A few cases have held that even in such a case, the transaction is usurious, so that the indorsee's claim against all parties to the instrument is subject to the defense of usury, where the price paid by such indorsee constitutes a greater discount from the face value than what is allowed by the usury law.[2]

A greater number of cases have held that while the indorsement is in such a case usurious, so far as liability of the immediate indorser is concerned, it does not affect the indorsee's title to the bill or note, or his claim against the primary obligors and prior indorsers.[3]

The third view, which is more consonant with the demands of the commercial world, and which is supported by the great weight of authority, is that the indorsement of an existing, complete bill or note is in every respect a sale of a commodity, and not "a loan or forbearance of money"

[1] Veazie Bank *v.* Paulk, 40 Me. 109; Lloyd *v.* Keach, 2 Conn. 175 (7 Am. Dec. 256); Nat. Bank of Auburn *v.* Lewis, 75 N. Y. 516 (31 Am. Rep. 484); Noble *v.* Walker, 32 Ala. 456; May *v.* Campbell, 7 Humph. 450.

[2] Whitworth *v.* Adams, 5 Rand. 419.

[3] Knight *v.* Putnam, 3 Pick. 184; Ballinger *v.* Edwards, 4 Ired. Eq. 449; Armstrong *v.* Gibson, 31 Wis. 61 (11 Am. Rep. 599); Newman *v.* Williams, 29 Miss. 222. See Nichols *v.* Pearson, 7 Pet. 103; Gaul *v.* Willis, 26 Pa. St. 259.

which comes within the provisions of the law against usury; that this law does not in such a case affect either the liability of the primary obligor and prior indorsers, or of the immediate indorser, to the indorsee. These cases hold, that where an indorsement is made at a discount from the face value of the bill or note, which would be usurious, if made in the original loan of the money on such bill or note, the transaction will not be considered usurious, and hence illegal, in any respect whatever; and that such indorsee has his remedy on the bill or note, not only against the maker, drawer, acceptor and prior indorsers, but also against the immediate indorser.[1]

§ 105. **Inadequacy of price, as affecting amount which may be recovered of primary obligor and indorser.**— Another occasion for contrariety of opinion is the determination of the amount that the holder of a bill or note can recover of the drawer and acceptor or maker and prior indorsers on the one hand, and of the immediate indorser on the other, where he pays less than the face value for such bill or note.

There is probably no contradiction of authority on the proposition that the holder can recover the full face value of the primary obligors and prior indorsers, where the transaction is not tainted with fraud, or other equitable defense. But where there is a defense to the action on the paper, which is available against the prior indorsee or payee, some of the cases hold that the holder can recover only the consideration he paid *plus* interest; as the object of the doctrine of *bona fide* ownership is only to indemnify the *bona fide* holder against loss, on account of the non-liability of the prior parties to the bill or

[1] Nichols *v.* Pearson, 7 Pet. 103; Fowler *v.* Strickland, 107 Mass. 552; City Bank *v.* Perkins, 29 N. Y. 554 (86 Am. Rep. 332); Brown *v.* Penfield, 36 N. Y. 473; Lloyd *v.* Keach, 2 Conn. 175 (7 Am. Dec. 256); Importers &c. Nat. Bank *v.* Littel, 46 N. J. L. 233; Gaul *v.* Willis, 26 Pa. St. 259; Roark *v.* Turner, 29 Ga. 455; National Bank *v.* Green, 33 Iowa, 140; Noble *v.* Walker, 32 Ala. 456; Bunzel *v.* Maas (Ala. '97), 22 So. 568; Lee *v.* Pile, 37 Ind. 107.

note.[1] Other decisions, on the other hand, maintain that in every case, where suit can be maintained at all, the *bona fide* holder can recover the full face value of the primary obligors and prior indorsers.[2] Other cases, again, maintain that only the consideration actually paid can be recovered of the drawee, acceptor or maker, where the one sued has signed the paper for accommodation, and the holder knew that fact when he took the paper.[3]

The same contradiction of authority exists in determining how much, in case of inadequacy of price, can be recovered of the immediate indorser; some of the authorities maintaining that the full face value can be recovered,[4] while other cases maintain that only the consideration paid can be recovered of such immediate indorser.[5]

§ 106. **Usual course of business.**— No one can claim to be a *bona fide* holder, so as to secure in his own person the protection against the so-called equitable defenses, unless he has acquired title to the bill or note, in what is called "the usual course of business." This means that he must

[1] Stoddard *v.* Kimball, 6 Cush. 469; Clark *v.* Sisson, 22 N. Y. 312; Gordon *v.* Boppe, 55 N. Y. 665; Holcomb *v.* Wyckoff, 35 N. J. L. 35 (10 Am. Rep. 219); Oppenheimer *v.* Farmers' &c. Bank, 97 Tenn. 19 (36 S. W. 705); Exchange Bank *v.* Butner, 60 Ga. 654; Bailey *v.* Smith, 14 Ohio St. 396 (84 Am. Dec. 385); Grant *v.* Kidwell, 30 Mo. 455; Buchanan *v.* International Bank, 78 Ill. 500; Curtis *v.* Mohr, 18 Wis. 645; Petri *v.* Fond du Lac N. B., 84 Tex. 212 (20 S. W. 777).

[2] Cromwell *v.* County of Sac, 96 U. S. 51; Railroad Companies *v.* Schutte, 103 U. S. 118; Wade *v.* Chicago &c. R. R. Co., 149 U. S. 327; Lay *v.* Wissman, 36 Iowa, 305; Schoen *v.* Houghton, 50 Cal. 528; U. S. Nat. Bank *v.* McNair, 116 N. C. 550 (21 S. E. 389); Bissell *v.* Dickerson, 64 Conn. 61 (29 A. 473).

[3] Dresser *v.* Mo. &c. Ry. Co., 93 U. S. 92; Hubbard *v.* Chapin, 2 Allen, 328; Lay *v.* Wissman, 36 Iowa, 305. See Daniels *v.* Wilson, 21 Minn. 530, where this rule is held to apply only where the cause of action is subject to some defense not appearing on the face of the paper.

[4] Durant *v.* Banta, 26 N. J. L. 624; Lloyd *v.* Keach, 2 Conn. 175 (7 Am. Dec. 256); Moore *v.* Baird, 30 Pa. St. 139; Roach *v.* Turner, 29 Ga. 455; National Bank *v.* Green, 33 Iowa, 140.

[5] Munn *v.* Commission Co., 15 Johns. 44 (8 Am. Dec. 219); Cage *v.* Palmer, 16 Cal. 158; Noble *v.* Walker, 32 Ala. 456.

have acquired the paper in the course of a common and customary negotiation of it. The character of the consideration does not affect the question; and it has been held that the transfer of a bill or note in payment of a pre-existing debt has nevertheless been made in the usual course of business.[1] It is the character of the transfer which determines the question, whether it has been made "in the usual course of the business."

If the paper is payable to order, any transfer except by indorsement by the payee or last indorser will not be in "the usual course of business," and the transferee takes the bill or note subject to equitable defenses.[2] And whether the paper be payable to order or to bearer, involuntary transfers, as to assignees in bankruptcy or receivers, or even to assignees for the benefit of creditors, are not held to be made in the usual course of business; and such transferees take negotiable paper subject to whatever defenses may be available against their assignors.[3]

Whether a negotiation of a bill by an acceptor is a usual course of business, so as to enable the transferee to claim the protection of a *bona fide* holder, has been decided in the affirmative[4] and in the negative.[5]

[1] Swift *v.* Tyson, 16 Pet. 1; Schepp *v.* Carpenter, 51 N. Y. 602; Hotchkiss *v.* Fitzgerald &c. Plaster Co., 41 W. Va. 375; 23 S. E. 576; McPherson *v.* Bondreau, 48 La. Ann. 431 (19 So. 550); Robinson *v.* Lair, 31 Iowa, 9. See Burnham *v.* Merchants' Exch. Bank, 92 Wis. 277 (66 N. W. 510).

[2] Lancaster Nat. Bank *v.* Taylor, 100 Mass. 18 (97 Am. Dec. 70; 1 Am. Rep. 71); Mills *v.* Porter, 4 Hun, 524; Gibson *v.* Miller, 29 Mich. 355 (18 Am. Rep. 98); Sturges *v.* Miller, 80 Ill. 241; Losee *v.* Bissell, 76 Pa. St. 459. See *ante*, § 78, 83.

[3] Billings *v.* Collins, 44 Me. 271; Roberts *v.* Hall, 37 Conn. 205 (9 Am. Rep. 308); Litchfield Bank *v.* Peck, 29 Conn. 384; Stephens *v.* Olson, 62 Minn. 295; 64 N. W. 898 (transfer to new partnership). But see Earhart *v.* Gant, 32 Iowa, 481, where a contrary ruling was made under the statute. And see also Irby *v.* Blain, 31 Kan. 716 (3 P. 499); Jones *v.* Wiesen (Neb. '97), 69 N. W. 762, where such purchaser is held to have all the rights of an indorsee without recourse.

[4] Morley *v.* Culverwell, 7 M. & W. 174; Witte *v.* Williams, 8 S. C. 290 (28 Am. Rep. 294).

[5] Central Bank *v.* Hammett, 50 N. Y. 158.

§ 107. **Transfer before and after maturity.**— The universal rule of the law of commercial paper is that a bill or note ceases to be *negotiable* when it becomes due, and can afterwards be only *assigned*, *i. e.*, transferred without giving to the transferee any better title than what his assignor or transferrer had. The fact that the paper is overdue is sufficient to throw upon the transferee the duty of inquiring why it was not paid at maturity.[1] But the indorsee after maturity takes the paper subject only to those equities which arose between the original parties, and between himself and the primary obligor or his immediate indorser. He does not take the paper with notice of equities which arose between intermediate indorsers and indorsees.[2]

Where one signs a bill or note for accommodation, whether as primary obligor or indorser, it has been held that he is bound to an overdue indorsee, whether he knows of the character of his obligation or not; unless he signs with the agreement or understanding that the paper is to be negotiated before maturity or within a stipulated time, and the overdue indorsee knows that he has signed for accommodation. In the latter case, such overdue indorsee takes the paper, with constructive notice of the defense which such accommodation obligor has, and cannot hold

[1] Texas *v.* Hardenberg, 10 Wall. 68; Ferree *v.* N. Y. Security &c. Co., 74 Fed. 769; Hinckley *v.* Union Pac. R. R. Co., 129 Mass. 52 (37 Am. Rep. 297); Simpson *v.* Hall, 47 Conn. 417; City Bank of Dowagiac *v.* Dill, 102 Mich. 305 (60 N. W. 767); Marsh *v.* Marshall, 53 Pa. St. 396; Quimby *v.* Stoddard (N. H.), 35 A. 1106; Leach *v.* Funk (Iowa, '96), 66 N. W. 768; Charke *v.* Dederick, 31 Md. 148; Davis *v.* Noll, 38 W. Va. 66 (17 N. E. 791); Kellogg *v.* Schnaake, 56 Mo. 136; Lee *v.* Turner, 89 Mo. 489 (14 S. W. 505); Kittle *v.* Delamater, 3 Neb. 325; Scott *v.* First Nat. Bank, 71 Ind. 445; Kernohan *v.* Durham, 48 Ohio St. 1 (26 N. E. 982); Greenwell *v.* Haydon, 78 Ky. 333 (39 Am. Rep. 234); Walker *v.* Wilson, 79 Tex. 185 (14 S. W. 798; 15 S. W. 402); Stafford *v.* Fargo, 35 Ill. 481; Nunes *v.* Russell, 65 Ill. App. 171; Risley *v.* Gray, 98 Cal. 40 (32 P. 884); Vance *v.* First Nat. Bank, 49 La. Ann. 378 (21 So. 866).

[2] Hill *v.* Shields, 81 N. C. 250 (31 Am. Rep. 499); Warren *v.* Haight, 65 N. Y. 171; Crosby *v.* Tanner, 40 Iowa, 136; Etheridge *v.* Gallagher, 55 Miss. 458; Wyman *v.* Robbins, 51 Ohio St. 98 (37 N. E. 264).

him liable.[1] But in New York and other States, it has been held that in every case of accommodation, there is an implied agreement that the paper is to be negotiated before maturity, and that, therefore, the accommodation party is not liable on the paper to an immediate overdue indorsee.[2] The overdue indorsee is also not subject to any equity arising against his indorser after the transfer, or to any set-off arising out of collateral or independent claims.[3]

But in all these cases, it must be remembered that while the overdue indorsee does not get any better title than what his indorser had; he does get whatever title or right he had. Hence, if the transfer after maturity was made by one, who before maturity had acquired title as a *bona fide* holder, the overdue transferee could recover of the parties to the paper on the strength of the *bona fide* character of his transferrer's title. This is not only the rule in the case of transfer of overdue paper, but, also, where the transferee takes the paper before the maturity with notice from one who is a *bona fide* holder.[4] But this rule is subject to this exception, that if the paper were open to defense in the hands of the payee or of some

[1] Dunn *v.* Weston, 71 Me. 270 (36 Am. Rep. 310); Parr *v.* Jewell, 16 C. B. 684; Caruthers *v.* West, 11 Q. B. 144; Seyfert *v.* Edison, 44 N. J. L. 393.

[2] Chester *v.* Dorr, 41 N. Y. 279; Hoffman *v.* Foster, 43 Pa. St. 137; Peale *v.* Addicks, 174 Pa. St. 549 (34 A. 203); Battle *v.* Weems, 44 Ala. 105; Simons *v.* Morris, 53 Mich. 155.

[3] Baxter *v.* Little, 6 Met. 7 (39 Am. Dec. 707); Barker *v.* Valentine, 10 Gray, 341; Simpson *v.* Hall, 47 Conn. 417; Elliott *v.* Deason, 64 Ga. 63; Eversole *v.* Maull, 50 Md. 96; Whittaker *v.* Kuhn, 52 Iowa, 315 (3 N. W. 127); Arnot *v.* Woodburn, 35 Mo. 99; Davis *v.* Miller, 14 Gratt. 1. But see *contra*, Driggs *v.* Rockwell, 11 Wend. 504; Davis *v.* Neligh, 7 Neb. 78; Downing *v.* Gibson, 53 Iowa, 517 (5 N. W. 699) (statute controlling).

[4] Hoffman *v.* Bank of Milwaukee, 12 Wall. 181; Commissioners of Madison Co. *v.* Clark, 94 U. S. 278; Roberts *v.* Lane, 64 Me. 108 (18 Am. Rep. 242); Bissell *v.* Gowdy, 31 Conn. 47; Wilson *v.* Mechanics Sav. Bank, 45 Pa. St. 488; Hogan *v.* Moore, 48 Ga. 156; Bassett *v.* Avery, 15 Ohio St. 299; Scott *v.* First Nat. Bank, 71 Ind. 445; Barker *v.* Lichtenberger, 41 Neb. 751 (60 N. W. 79); Bradley *v.* Marshall, 54 Ill. 173; Robinson *v.* Smith, 62 Minn. 62 (64 N. W. 90); Simon *v.* Merritt, 33 Iowa, 537; Kinney *v.* Kruse, 28 Wis. 183; Donnerberg *v.* Oppenheimer, 15 Wash. 290 (46 P. 254).

prior indorsee, he could not, by securing a retransfer to himself of the bill or note by a subsequent *bona fide* indorsee or holder, claim the benefit of the superior title of such subsequent *bona fide* holder.[1]

§ 108. **Paper payable on demand or at sight, when overdue.** — Where a bill or note is made payable on demand, or at sight, it becomes payable immediately on demand by the holder, except that, in some of the States, an instrument payable at sight carries the days of grace.[2] This is true, not only when the bill or note is payable "on demand" or "at sight;" but also where some other equivalent phrase is employed to denote the time of payment, as "in such portions and at such times as the directors may direct."[3]

At one time it was held that a bill or note, particularly a note which was payable on demand, was never overdue, so as to let in equitable defenses, as long as there has been no demand for payment.[4] But it now seems to be definitely settled, at least in this country, that such a paper is overdue, if it remains unpaid for an *unreasonable* time after its date or the day of delivery; and if it is transferred after the lapse of what is considered by the courts to be a reasonable time for payment, the transferee cannot claim the superior title of a *bona fide* holder. On the other hand, if the bill or note is transferred within a reasonable time after its negotiation, the transferee is not charged with constructive notice of the prior demand and dishonor.[5]

[1] Hatch *v.* Johnson Loan & Trust Co., 79 Fed. 828; Sawyer *v.* Allen, 9 Allen, 42; Tod *v.* Wick. 36 Ohio St. 370; Kost *v.* Bender, 25 Mich. 515; Fuller *v.* Goodnow, 62 Minn. 163 (64 N. W. 161).

[2] Hirst *v.* Brooks, 50 Barb. 534; Darling *v.* Wooster, 9 Ohio St. 517 And part payment would, of course, be taken as evidence of a demand, and of a consequent maturity of the paper, as to the balance which remained unpaid. Bayliss *v.* Pearson, 15 Iowa, 279.

[3] Howland *v.* Edmonds, 24 N. Y. 307. See to the same effect, Bowman *v.* McChesney, 22 Gratt. 609.

[4] Brooks *v.* Mitchell, 9 M. & W. 15; Lea *v.* Glover, 1 Bradw. 335; Gordon *v.* Preston, Wright (Ohio), 341.

[5] Thrall *v.* Mead, 40 Vt. 540; Works *v.* Hershey, 35 Iowa, 340; Poor-

In determining what is to be considered as a reasonable time, after the lapse of which a bill or note is to be treated as overdue, no general rule or principle can be formulated, which will clearly point to the answer. The mere length of time is no guide. In every case, the conclusion depends upon its peculiar circumstances. If it is ascertained from the circumstances of the particular case under inquiry, that the parties had intended the instrument to be a continuing obligation, and had not anticipated an immediate payment of the bill or note, a greater length of time would be considered reasonable, than where the circumstances disclose the expectation of an early payment. In the case of bills, the continuous circulation of the paper, by transfer from one party to another, and from place to place, is a controlling circumstance; and in the case of bills and notes, the most common measure of the reasonableness of the time is the presence or absence in the instrument of the reservation of interest. The reservation of interest is taken to be signal proof of the intention of the parties to make the instrument a continuing obligation; and the actual determination of what is a reasonable time varies with the lengths of the periods of payment of interest.[1]

man *v.* Mills, 29 Cal. 118 (95 Am. Dec. 90); Bacon's Adm'r *v.* Bacon's Trustee (Va. '97), 27 S. E. 576.

[1] In the following cases, the instrument was held to be overdue, when transferred: Camp *v.* Clark, 14 Vt. 387 (two months); Losee *v.* Dunkin, 7 Johns. 70; 5 Am. Dec. 245 (two months and a half); Herrick *v.* Woolverton, 41 N. Y. 581; 1 Am. Rep. 461 (three months); La Due *v.* First Nat. Bank, 31 Minn. 33; 16 N. W. 426 (five months); Morey *v.* Wakefield, 41 Vt. 24; 98 Am. Dec. 562 (ten months); Turner *v.* Iron Chief Min. Co., 74 Wis. 355; 43 N. W. 149 (ten months); Cross *v.* Brown, 51 N. H. 486 (13 months); Crim *v.* Starkweather, 88 N. Y. 339; 42 Am. Rep. 250 (3½ years); Gregg *v.* Union &c. Nat. Bank, 87 Ind. 238 (six years); Leonard *v.* Olson (Iowa, '97), 68 N. W. 677 (ten years). In the following cases, bills and notes were held to be still negotiable, and therefore not yet overdue: Howe *v.* Hartness, 11 Ohio St. 449; 78 Am. Dec. 312 (two days); Mitchell *v.* Catchings, 23 Fed. Rep. 710 (23 days); Sice *v.* Cunningham, 1 Cow. 397 (five months); Castle *v.* Candee, 16 Conn. 224 (nine months); Ranger *v.* Cary, 1 Met. 369 (two years); Jameson *v.* Jameson, 72 Mo. 640 (six years, where note was payable at any time during maker's lifetime and demand was made one year after maker's death).

In some of the States, the time when such paper becomes overdue is now regulated by statute, notably in Massachusetts, Connecticut, California, and others. But the bill or note still remains payable on demand, so that, notwithstanding the statute, it matures as between the original parties whenever payment is demanded.[1]

Where this question is not regulated by statute, a note payable on demand, without reservation of interest, is held to be due immediately, for the purposes of the Statute of Limitations; so that the statute will run from the date of the note; but where interest is reserved, it will run from the expiration of what is considered to be a reasonable time for the maturing of the note.[2]

§ 109. **Transfer after default in the payment of installment of principal or interest.** — If a bill or note is made payable in installments at succeeding dates, default in the payment of one installment of the principal sum will constitute such a dishonor of the entire bill or note as to make a subsequent transferee take the paper subject to all the equities, whether the entire sum becomes payable on default in one installment or not.[3]

But the authorities are not agreed as to the effect of a default in the payment of an installment of interest. All are agreed that if the note stipulates that the whole principal sum shall become due and payable, if the installment of interest is not paid, any subsequent transferee would not be a *bona fide* holder. But, although it has been held that the failure to pay an installment of interest would destroy the negotiability of the note, whether it contains

[1] Seymour *v.* Continental Life Ins. Co., 44 Conn. 300 (26 Am. Rep. 469).

[2] Thrall *v.* Mead, 40 Vt. 540; Lavellete *v.* Wendt, 75 N. Y. 579; Shutts *v.* Fingar, 100 N. Y. 539 (3 N. E. 588); Presbrey *v.* Williams, 15 Mass. 193. For special applications of the principle, see Jameson *v.* Jameson, 72 Mo. 640; Kilbreath *v.* Gaylord, 34 Ohio St. 305.

[3] Vinton *v.* King, 4 Allen, 562; Field *v.* Tibbetts, 57 Me. 358 (99 Am. Dec. 779). See, as to stipulation that all of a series of notes shall become due on default in payment of one, National Bk. of Battle Creek *v.* Dean, 86 Iowa, 656 (53 N.W. 338).

the stipulation for acceleration of payment or not,[1] the better opinion is that, where there is no such stipulation, default in the payment of the interest does not take away the negotiability of the note, and the subsequent transferee can claim the protection of a *bona fide* holder; at least, where the holder takes the paper without notice of the default.[2]

§ 110. **Transfer on last day of grace, or day of maturity,**— before the close of the hours of business, is said by some of the authorities to be a transfer before maturity;[3] but there is authority for holding that the paper is overdue at that time, and the transferee on the day of payment takes the paper subject to the equities.[4]

§ 111. **Actual and constructive notice of defenses.**— One of the requirements of *bona fide* ownership is that the holder must be a purchaser without notice of defenses to the bill or note. But in order that notice may affect the purchaser's title as a *bona fide* holder, he must receive the notice before he has completed the transfer of the paper to him by the payment of the consideration; and if he has paid only a part of the consideration, when he received notice, he is a *bona fide* holder *pro tanto*, for the amount which he has already paid.[5] If an agent of the purchaser receives notice, while he is representing his principal in

[1] Newell *v.* Gregg, 51 Barb. 263. And see First Nat. Bank *v.* Scott Co., 14 Minn. 77; First Nat. Bank *v.* Forsyth (Minn. '97), 69 N. W. 909.

[2] Kelley *v.* Whitney, 45 Wis. 110 (30 Am. Rep. 697); Cromwell *v.* County of Sac, 96 U. S. 51; First Nat. Bk. *v.* Forsyth (Minn. '97), 69 N. W. 909. But see Nat. Bank of N. A. *v.* Kirby, 108 Mass. 497; Chouteau *v.* Allen, 70 Mo. 290.

[3] Crosby *v.* Grant, 36 N. H. 273; Savings Bank *v.* Bates, 8 Conn. 505; Holton *v.* Hubbard, 49 La. Ann. 715 (22 So. 338).

[4] Pine *v.* Smith, 11 Gray, 38. But see Shawmut Nat. Bank *v.* Manson (Mass. '97), 47 N. E. 196, where bank, which had credited payees with amount of check and permitted them to draw against it, before receiving report from the clearing house, was held to be a *bona fide* holder.

[5] Dresser *v.* Mo. &c. Ry. Co., 93 U. S. 92; Weaver *v* Barden, 49 N. Y. 291; Perkins *v.* White, 36 Ohio St. 330; Harrington *v.* Butte & B. Min. Co. (Mont. '97), 48 P. 758.

that particular transaction, the principal is charged with such notice, but the notice is not imputed to the principal, if the agent receives it, when he is engaged with his own affairs.[1] But where one is a member of two firms, knowledge of defenses to a bill or note, which such partner acquires as a member of the first firm, will be imputed to the second firm, where the latter becomes a holder of such bill or note, through the instrumentality of this common partner.[2]

All through the law, a distinction is made between *actual* and *constructive* notice. Actual notice, at least in the present connection, may be defined as the synonym of actual knowledge of an existing defense to the bill or note in question. Whenever a purchaser has actual notice of such a defense, there can be no doubt that he cannot claim to be a *bona fide* holder. The difficulty is experienced in determining his *bona fide* ownership, when he has received no actual notice, but he has become possessed of information which arouses, or is calculated to arouse, in the mind of a reasonably prudent man some suspicion that the bill or note is subject to some objection to its validity. Some of the cases hold that the purchaser's claim to *bona fide* ownership is destroyed whenever a well-grounded suspicion as to the validity of the bill or note finds lodgment in his mind, and he fails to dissipate such suspicion by reasonable inquiry in the proper quarters.[3] But the better rule seems to be that his information, which arouses his suspicions, must amount to actual notice of the probable existence of *a* defense to the bill or note, al-

[1] First Nat. Bank *v.* Babbidge, 160 Mass. 563 (36 N. E. 462); Smith *v.* Ayer, 101 U. S. 320; Oates *v.* National Bank, 100 U. S. 239; Casco N. B. *v.* Clark, 139 N. Y. 307 (34 N. E. 908); Higgins *v.* Ridgway, 90 Hun, 398; Baker *v.* Guarantee T. & S. D. Co. (N. J. Eq.) 31 A. 174; Tilden *v.* Barnard, 43 Mich. 376 (38 Am. Rep. 197); Nat. Bank of Bedford *v.* Stever, 169 Pa. St. 574 (32 A. 603); Hardy *v.* First Nat. Bank, 56 Kan. 493; Knott *v.* Tidyman, 86 Wis. 164 (56 N. W. 632); Benton *v.* Germ.-Am. N. B., 122 Mo. 332 (26 S. W. 975).

[2] International Trust Co. *v.* Wilson, 161 Mass. 80 (36 N. E. 589); Cheever *v.* Pittsburg &c. Ry. Co., 72 Hun, 380.

[3] Angle *v.* N. W. &c. Ins. Co., 92 U. S. 330; Rowland *v.* Fowler, 47 Conn. 347.

though he need not have any information of the character of such probable defense.[1] For example, if a bill or note is payable to one as "trustee," and indorsed to the purchaser in payment of the individual debt of the payee, the purchaser is charged with constructive notice of the misappropriation of the note.[2]

The cases are not uniform in determining the effect of the statement in the bill or note of the consideration for the same, on the *bona fide* ownership of the purchaser. There are cases, which maintain that in such a case, the purchaser of the bill or note is charged with the duty of inquiring into the performance and validity of the consideration. And it would seem to be a well-established general rule that the statement of an illegal consideration in the bill or note would prevent the purchaser from claiming the protection of a *bona fide* holder.[3] But, independently of statute, the better opinion is that the purchaser of a bill or note is not required to see that the

[1] Horton *v.* Bayne, 52 Mo. 533; Hamilton *v.* Vought, 33 N. J. L. 187; De Long *v.* Schroeder, 45 Ill. App. 236; Scott *v.* Scott, 38 N. Y. S. 613; 2 App. Div. 240; Merchants' Nat. Bank *v.* Tracy, 77 Hun, 443; State Bank *v.* Wilkie, 35 Neb. 579 (53 N. W. 1603); Atlas Nat. Bank *v.* Holm, 71 Fed. 489; 19 C. C. A. 94; Doe *v.* N. W. Coal & Transportation Co., 78 Fed. 62; Jennings *v.* Todd, 118 Mo. 296 (24 S. W. 148); Merchants Nat. Bank *v.* McNier, 51 Minn. 178 (53 N. W. 178); Skinner *v.* Raynor (Iowa), 64 N. W. 601; Thompson *v.* Sioux Falls N. B., 150 U. S. 231; Clark *v.* Evans, 66 Fed. 263; 13 C. C. A. 433; Second Nat. Bank *v.* Morgan, 165 Pa. St. 199 (30 A. 957). See *ante*, § 101.

[2] Shaw *v.* Spencer, 100 Mass. 382 (97 Am. Dec. 107; 1 Am. Rep. 115); Railway &c. Pub. Co. *v.* Lincoln Nat. Bk., 82 Hun, 8; Third Nat. Bank *v.* Lange, 51 Md. 138 (34 Am. Rep. 304); Strong *v.* Straus, 40 Ohio St. 87 (guardian); Johnson *v.* Suburban Realty Co., 62 Mo. App. 156 (actual knowledge); Chemical Nat. Bank *v.* Wagner, 93 Ky. 525 (20 S. W. 535); Capital Sav. Bk. and Trust Co. *v.* Swan (Iowa, '97), 69 N. W. 1065. But see *contra*, Westmoreland *v.* Foster, 60 Ala. 448, the word "trustee" being held to be only a *descriptio personae;* and Buchanan *v.* Mechanics' Loan & Sav. Inst., 84 Md. 430 (35 A. 1099); N. Y. Nat. Exch. Bank *v.* Crowell, 177 Pa. St. 313 (35 A. 613); Paulette *v.* Brown, 40 Mo. 52 (curator); Fletcher *v.* Schaumberg, 41 Mo. 501 (sheriff); First Nat. Bank *v.* Wallis, 150 N. Y. 455 (44 N. E. 1038); Kaiser *v.* First Nat. Bank, 78 Fed. 281; 24 C. C. A. 88.

[3] See *ante*, §§ 51, 94, as to illegal consideration, and *post*, § 113, as to burden of proof.

consideration has been fully performed, where he happens to know the consideration, in order to make good his claim of *bona fide* ownership.[1]

If the bill or note has been issued for the accommodation of one of the payees or has been indorsed by someone for accommodation of the maker or drawer, knowledge of the accommodation character of the paper, or of the indorsement, does not affect the *bona fide* ownership of the purchaser.[2] Where, however, there has been a diversion of the accommodation paper from its intended purpose to the manifest injury of the accommodation party, and the purchaser knows of such unauthorized diversion, he cannot claim to be a *bona fide* holder against such accommodation party.[3] If, however, the diversion does not result in any material injury to the accommodation party, the *bona fide* ownership of the purchaser is not affected by such diversion; as where it was intended that the bill or note was to have been negotiated at one bank, and it was discounted at another, or where the payee or other party accommo-

[1] Patten *v.* Gleason, 106 Mass. 439; Thrall *v.* Horton, 44 Vt. 386; Davis *v.* McCready, 17 N. Y. 230 (72 Am. Dec. 461); Mishler *v.* Reed, 76 Pa. St. 76; Heist *v.* Hart, 73 Pa. St. 286; Adams *v.* Robinson, 69 Ga. 627; Post *v.* Abbeville & W. Ry. Co. (Ga. '97), 25 S. E. 505; Kelley *v.* Whitney, 45 Wis. 110 (30 Am. Rep. 697); Stevenson *v.* O'Neal, 71 Ill. 314; Ehrler *v.* Worthen, 47 Ill. App. 550; Biegler *v.* Merchants' Loan & Tr. Co., 164 Ill. 197 (45 N. E. 512); McCarty *v.* Louisville Banking Co. (Ky. '97), 37 S. W. 144. In some of the States, it is required by statute that notes given for the purchase of patent rights shall contain a statement to that effect. The object of the statutes is to charge purchasers with notice of defenses, growing out of the failure of the consideration. See Miller *v.* Finley, 26 Mich. 249 (12 Am. Rep. 306); Haskell *v.* Jones, 86 Pa. St. 173; Woolen *v.* Ulrich, 64 Ind. 120.

[2] Grant *v.* Ellicott, 7 Wend. 227; Stevens *v.* Monongahela Bank, 88 Pa. St. 157 (32 Am. Rep. 438); Thatcher *v.* West River Nat. Bank, 19 Mich. 196; Christy *v.* Campau (Mich. '96), 65 N. W. 12; Jones *v.* Berryhill, 25 Iowa, 289; Tourtelot *v.* Reed, 62 Minn. 384; 64 N. W. 928. But see *ante*, § 54.

[3] Clark *v.* Thayer, 105 Mass. 216 (7 Am. Rep. 511); Daggett *v.* Whiting, 35 Conn. 366; Farmers' &c. Nat. Bank *v.* Moxon, 45 N. Y. 762; Nickerson *v.* Ruger, 76 N. Y. 279; Comstock *v.* Hier, 73 N. Y. 269 (29 Am. Rep. 142); Davenport *v.* Stone, 104 Mich. 521; 62 N. W. 722; Gray *v.* Bank of Kentucky, 29 Pa. St. 365.

dated transfers it in payment of an existing debt, instead of raising money for the purpose of paying such debts.[1] But if an accommodation note is given for the purpose of taking up an old note, on which the accommodation party is liable, it would be an unwarrantable diversion to discount it at the bank and apply the money thus realized to some other purpose.[2] But if the bank or indorsee does not know of this diversion, he or it will take the renewal as a *bona fide* holder.[3]

It must be remembered that when a *bona fide* holder transfers the paper to another, the latter can claim the protection afforded by the *bona fide* ownership of his transferrer.[4]

§ 112. **Notice by lis pendens.**—The *bona fide* holder is not charged with constructive notice of a pending suit,[5] or of the registration of some lien or mortgage for a bill or note,[6] where in either case the record shows that a defense can be set up against the bill or note, held by such *bona fide* holder.[7]

§ 113. **Burden of proof as to bona fide ownership.**— It is important to ascertain on whom the burden of proof rests to prove or disprove the fact of *bona fide* ownership. The burden shifts from one person to another, according to the facts of each case.

[1] Hay *v.* Jackele, 90 Hun, 114; Schepp *v.* Carpenter, 51 N. Y. 602; Quinn *v.* Hard, 43 Vt. 375 (5 Am. Rep. 284); Dunn *v.* Weston, 71 Me. 270 (36 Am. Rep. 310); Jackson *v.* First Nat. Bank, 41 N. J. L. 177.

[2] Moore *v.* Ryder, 65 N. Y. 438; Lintz *v.* Howard, 18 Hun, 424.

[3] First Nat. Bank *v.* Getz (Iowa, '96), 64 N. W. 799; Davenport *v.* Stone, 104 Mich. 521; 62 N. W. 722.

[4] For cases, see *ante,* § 107.

[5] Warren County *v.* Marcy, 97 U. S. 96; Myers *v.* Hazzard, 50 Fed. 155; Leitch *v.* Wells, 48 N. Y. 585; Day *v.* Zimmerman, 68 Pa. St. 72 (8 Am. Rep. 157); Mims *v.* West, 38 Ga. 18 (95 Am. Dec. 379); Stone *v.* Elliott, 11 Ohio St. 252; Mayberry *v.* Morris, 62 Ala. 113; Matheny *v.* Hughes, 10 Heisk. 401; Head *v.* Cole, 53 Ark. 523 (14 S. W. 898).

[6] Minell *v.* Read, 26 Ala. 730; Packwood *v.* Gridley, 39 Ill. 388.

[7] The effect of a pending garnishment on the rights of a *bona fide* holder is shown elsewhere, § 81.

It is a well-established and general rule of law, that the possession of a bill or note by the last indorsee, where the paper is payable to order, or by any one, where the paper is payable to bearer, or has been indorsed in blank, is *prima facie* proof of *bona fide* ownership; and the burden of proving the contrary is thrown upon the maker or other party defendant to the action.[1] But there is no such presumption from possession where the paper is payable to order, and is either unindorsed, or indorsed in full to some other person, unless the party in possession of the bill or note is the personal representative of the deceased indorsee or payee.[2] And there is no presumption of *bona fide* ownership, where a prior indorsee has possession.[3] In these cases, the party having possession must affirmatively prove his title.

Where the paper is payable to order and has been indorsed, if the maker or other party defendant proves want or failure of consideration, the burden is on him to prove that the holder did not pay consideration for the paper, and hence was not a *bona fide* holder for value.[4] But it has been held, although apparently without good reason for the distinction, that the burden is thrown on the holder that he paid value, where the paper is payable to bearer.[5]

[1] Brown *v.* Spofford, 95 U. S. 474; Flour City Bank *v.* Grover, 88 Hun, 4; Harger *v.* Worrall, 69 N. Y. 370 (25 Am. Rep. 206); Nickerson *v.* Ruger, 76 N. Y. 279; Palmer *v.* Nassau Bank, 78 Ill. 380; Shreves *v.* Allen, 79 Ill. 553; Johnson *v.* McMurray, 72 Mo. 278; First Nat. Bank *v.* Sproull, 105 Ala. 275 (16 So. 879); Blum *v.* Loggins, 53 Tex. 121; Faulkner *v.* Ware, 34 Ga. 498.

[2] Scoville *v.* Landon, 50 N. Y. 686; Gibson *v.* Miller, 29 Mich. 355 (18 Am. Rep. 98).

[3] Palmer *v.* Whitney, 21 Ind. 58.

[4] Commissioners *v.* Clark, 94 U. S. 278; Goodman *v.* Simonds, 20 How. 343; Seymour *v.* Malcolm &c. Lumber Co., 58 Fed. 957; 7 C. C. A. 593; Mechanics' &c. Bank *v.* Crow, 60 N. Y. 85; Belmont Branch Bank *v.* Hoge, 35 N. Y. 65; Davis *v.* Bartlett, 12 Ohio St. 534 (80 Am. Dec. 375); Kelman *v.* Calhoun, 43 Neb. 157 (61 N. W. 615); Peabody *v.* McAvoy, 23 Mich. 526; Little *v.* Mills, 98 Mich. 423 (57 N. W. 266); Davis *v.* Blanton, 71 Miss. 521 (15 So. 132); Lathrop *v.* Donaldson, 22 Iowa, 234.

[5] Bissell *v.* Morgan, 11 Cush. 198.

Where, however, fraud or illegality is proven to have infected the original transaction, it is generally held that the burden of proof of *bona fide* ownership is shifted to the holder, on the ground that it is easier for him to prove affirmatively that he took the paper for value.[1]

The burden of proof shifts to the holder, also, where it is shown that the bill or note has been lost or stolen.[2] But it seems, however, in either case, that the burden of proof shifts again to the maker or other defendant, when the holder has proven that he has paid value for it. According to some of the authorities, he is not required to prove affirmatively that he took the paper without notice.[3]

[1] Smith *v.* County of Sac, 11 Wall. 139; Stewart *v.* Lansing, 104 U. S. 505; Sullivan *v.* Langley, 120 Mass. 437; Emerson *v.* Burns, 114 Mass. 248; Merchants' Exch. Nat. Bank *v.* Sav. Inst., 32 N. J. L. 170; Naples *v.* Brown, 48 Pa. St. 458; Sloan *v.* Union Bkg. Co., 67 St. 470; First Nat. Bank *v.* Green, 43 N. Y. 298; Grant *v.* Walsh, 145 N. Y. 502 (40 N. E. 209); New *v.* Walker, 108 Ind. 365 (9 N. E. 386); Sperry *v.* Spaulding, 45 Cal. 544; Hodson *v.* Eugene Glass Co., 156 Ill. 397 (40 N. E. 971); Faucett *v.* Powell, 43 Neb. 437 (61 N. W. 586); Merchants &c. Nat. Bank *v.* Trustees of Masonic Hall, 62 Ga. 271; Campbell *v.* Hoff, 129 Mo. 317 (31 S. W. 603); French *v.* Talbot Pav. Co., 100 Mich. 443 (59 N. W. 166).

[2] Worcester Co. Bank *v.* Dorcester &c. Bank, 10 Cush. 488 (57 Am. Dec. 120); Kuhns *v.* Gettysburg Nat. Bank, 68 Pa. St. 445; Union Bank *v.* Barber, 56 Iowa, 559 (9 N. W. 890); Dutchess Co. Ins. Co. *v.* Hatch, 1 Hun, 675.

[3] Kellogg *v.* Curtis, 69 Me. 212 (31 Am. Rep. 273); Quinn *v.* Hard, 43 Vt. 375 (5 Am. Rep. 284); Battles *v.* Loudenslager, 84 Pa. St. 446; Davis *v.* Bartlett, 12 Ohio St. 534 (80 Am. Dec. 375); Wright *v.* Irwin, 33 Mich. 82; Harbison *v.* Bank of Indiana, 28 Ind. 133 (92 Am. Dec. 308); Jones *v.* Burden, 56 Mo. App. 199; Johnson *v.* McMurray, 72 Mo. 282. But see *contra*, Camden Safe Dep. Co. *v.* Abbott, 43 N. J. L. 257; Vosburgh *v.* Dieffendorf, 119 N. Y. 357 (23 N. E. 801; Tilden *v.* Barnard, 43 Mich. 376 (38 Am. Rep. 197); Haggland *v.* Stuart, 29 Neb. 69 (45 N. W. 263).

ILLUSTRATIVE CASES.

Jennings *v.* Todd, 118 Mo. 296 (24 S. W. 148).
Geddes *v.* Blackmore, 132 Ind. 551 (32 N. E. 567).
Dreilling *v.* First Nat. Bank, 43 Kan. 197 (23 P. 94).
Roberts *v.* Hall, 37 Conn. 205.
Goshen Nat. Bank *v.* Bingham, 118 N. Y. 349 (23 N. E. 180).
Matson *v.* Alley, 141 Ill. 284 (31 N. E. 419).
Handy *v.* Sibley, 46 Ohio St. 329 (17 N. E. 329).

Failure or Non-performance of Consideration no Defense Against a Bona Fide Holder.

Jennings *v.* Todd, 118 Mo. 296 (24 S. W. 148).

MACFARLANE, J. This is a suit in equity to restrain defendant Todd, as trustee, from selling under a deed of trust certain real estate belonging to plaintiffs, and to cancel a note made by them to Potter, Chase & Co. or order, and held by defendant Bush as assignee. The petition charges, in substance, that on the 23d day of October, 1888, plaintiff James I. Jennings entered into a contract in writing with Potter, Chase & Co., through C. J. Chase, a member of the firm, by which the said company appointed him agent to control and manage the sale of an illustrated edition of the New Testament, and they agreed to furnish him 500 books as they might be called for at Kansas City, at $1 each, and reciting that he had given his note for $500, or $1 each on said books. In consideration for the purchase of said books on said day plaintiffs executed and delivered to said C. J. Chase their negotiable promissory note for $500, payable to said Potter, Chase & Co. 18 months after date, with 8 per cent interest from date, to secure which they gave a deed of trust on their said estate, with defendant Todd as trustee. That by the terms of said contract the note was not to be paid, and should be void, if the company did not fulfill every requirement of the contract. The petition charges further that said company did not perform and fulfill the contract in any particular, but wholly refused to supply the books, as needed and demanded by plaintiff; that plaintiff was induced to make the contract by false and fraudulent representations; and that defendant Bush purchased said note with full knowledge and notice of the fraudulent means by which it was procured, and of the stipulation in the contract by which the note might become void. The answer of defendant Bush was: First, in substance, a general denial; second, a plea of estoppel; and, third, that he was an innocent purchaser of the note. In the plea of estoppel it was charged that said defendant "purchased said note at the special instance, solicitation, and request of plaintiff, who told him he wished he would trade for it; that if he would he would consider him an innocent purchaser; and that, relying upon these representations to him by plaintiff, he purchased said note." Said defendant further answered that he was the purchaser of said note before maturity,

in good faith, for value, and without notice of any infirmity. The evidence leaves no doubt that the scheme into which plaintiffs were led by C. J. Chase was a gross fraud and swindle, which was also worked on others, as was incidentally shown. It is unnecessary to set out the contract in full. It is not at all intelligible, but was doubtless made clear and very beneficial by the representations of Chase. It contained the following clause: "He having settled for one outfit and book; also by note for five hundred dollars, the same being payment of ($1) one dollar each for 500 books, which he has this day purchased, leaving a balance due of one dollar on each book when ordered or delivered, from time to time, in such quantities as the said James L. Jennings may desire." On the back of the contract was the following indorsement: "Centralia, Mo., Oct. 23, 1888. The company hereby agrees that the note corresponding to the within contract shall be null and void whenever the company does not fulfill every point of the contract as signed. [Signed] C. J. Chase. For Potter, Chase & Co." The contract furnishes sufficient evidence that the books were to be shipped to Jennings from Kansas City whenever ordered, and that they were never furnished, though often ordered by Jennings.

Plaintiff testified that Chase promised not to assign the note. It appeared, however, from the evidence, that soon after its execution he indorsed and delivered it to Gahan Bros. as collateral security for a note made by Chase to them, who afterwards themselves indorsed it in blank. Without further indorsement it went into the hands of one or two other parties, and finally to defendant Bush before its maturity, who paid for it nearly its face value. It appears at this time that neither the fraud nor breach of contract had developed. It appears further that on the 2d day of October, 1888, plaintiffs executed and delivered to Chase another note, payable to the same company eight months after date. This note was also for books under a similar contract, but not containing the indorsement. Defendant Bush also held this note by purchase at the same time.

The only questions of fact or law for our determination on this appeal are whether defendant was a purchaser of the note in good faith and for value, and whether plaintiffs, by their acts, conduct, and representations, are estopped to dispute its validity. The questions of fact on both propositions were found by the circuit court against the defendant. The evidence of plaintiff and defendant Bush was in direct and irreconcilable conflict. Each were corroborated by direct evidence of witnesses and by circumstances. Plaintiff testified in the most positive terms that he read the contract and indorsement to defendant before he purchased the note; and Roberts testified that he was present and heard them read, and there were other corroborating circumstances. On the other hand defendant testified that he had no recollection of plaintiff reading either the contract or indorsement, and the fact that he paid near the face value for the note

is a circumstance tending to corroborate his evidence on that question. On the question of estoppel defendant testified that he purchased the notes on December 8, 1888. Before he bought them he went to Mr. Jennings, and told him that the notes had been offered him. "When I asked him should I trade for the note, he said, 'Yes, I wish you would.' He said: 'Then they will be right here, and as soon as my family is able I will make the money, and pay them off. I will be glad if you will purchase them. It will not be like that other circumstance. I will consider you an innocent purchaser.' I bought them on his representation. I had no knowledge of the existence of any such paper as Mr. Jennings had." William Walker testified that he afterwards heard Jennings say that he considered defendant an innocent purchaser. On this question plaintiff himself testified: "Mr. Bush talked to me about the purchase of the notes. I told him if anybody was to get them I would as soon have him purchase them as anybody." The evidence shows that defendant purchased the note, and it was delivered to him on the 15th day of December, 1888, and the contract and indorsement were read to him on the 13th of that month, and it was prior to this date that defendant had asked plaintiff about buying the note. At the time of these transactions plaintiff had made no order for books under this contract.

The following facts may be taken as established by the evidence: (1) Defendant purchased the note for value before maturity; (2) that he was aware of the terms of the contract and the indorsement when he purchased; (3) that plaintiff encouraged defendant to purchase the note. The court found for plaintiff, and granted the relief sought and defendant appealed.

1. That defendant purchased the note for value before maturity is not questioned, either under the pleadings or evidence. The good faith of the transaction is the only subject of inquiry on this branch of the case. Defendant insists that, though the contract may have been fraudulent in its inception, and he may have been aware of the questionable methods under which Chase conducted his business, and of the suspicious circumstances under which the contract in question was obtained, and that he also had knowledge of the contemporaneous written agreement, yet neither one nor all of these facts together relieved the note of its negotiability; that nothing short of actual knowledge of the fraud, or that there had been a breach of the contract before the note came into his hands, could defeat his right to enforce his security against the land. In general one will be charged with notice of a fact who has information which should put him upon inquiry if, by following up such information with diligence and understanding, the truth could have been ascertained. It is now well settled in this State, however, that the doctrine of notice, as it affects the good faith of transactions generally, does not apply to negotiable commercial paper. "Both upon principle and authority," says Wagner, J., "and from the experience of jurists and commercial

men, and the interests of the affairs of business life, it is safe to say that the liberal doctrine which promotes the free circulation of negotiable instruments is the best, and that the good faith of the transaction should be the decisive test of the holders of rights." Hamilton *v.* Marks, 63 Mo. 178. Since the decision in that case it has been settled law in this State "that the consideration of negotiable paper in the hands of a bona fide holder for value before maturity cannot be inquired into. Mala fides alone can open the door to such inquiry. Gross negligence even is not sufficient; actual notice of the facts which impeach the validity of the note must be brought home to the holder." Mayes *v.* Robinson, 93 Mo. 122; 5 S. W. 611.

2. The next inquiry is, were the rights of defendant, as indorsee of the note, affected by knowledge of the transaction which was the consideration of the note, and of the indorsement on the back of the contract. The contract, indorsement and note have the same date, and, as the evidence shows, were made at the same time. According to the general rule of construction, in general business matters, these being all made at the same time, and relating to the same transaction, should be read and construed together; but should that rule be applied when one of the instruments is a negotiable security? It is said that the rule may be applied to the construction of a contemporaneous written contract affecting the terms of negotiable paper, "in so far as each may be given effect, and there is no repugnancy between them.' Daniel Neg. Inst., § 156. The rule is frequently applied to collateral agreements for renewals, for the payment of an additional sum upon a contingency, for the same consideration, and fixing a time for payment of note or interest. Id. An indorsee with notice will be bound by such agreements. They are not repugnant to the negotiable character of the note. We think, however, that no well-considered case can be found in which a collateral contemporaneous agreement providing that the note should not be paid in the event that an executory contract, which was the consideration of the note, should not be performed, has been allowed to defeat the negotiability of the note in the hands of an indorsee though he had notice of such agreement. A great part of the improvement of the country and of business generally is carried on with money raised by the discount of notes given upon executory contracts, and if the maker could be allowed to defend against such notes, in case of a breach of contract on the ground that the indorsee, though in other respects bona fide, had knowledge of the transaction out of which the note grew, all confidence in such notes as negotiable paper would be destroyed, and such business would be paralyzed. By making and delivering a negotiable note the maker is held to intend that it may be put in circulation, and that no defenses against it exist. In purchasing such note no inquiry as to the consideration is required. If a failure of consideration occur, the maker must look to the payee for indemnity. On this subject Parsons,

in his work on Bills and Notes (volume 1, p. 261), says: "Knowledge on the part of the holder, at the time he took the note, that it was not to be paid on a specified contingency, is not sufficient to defeat his right to recover, although the contingency had then happened, if he was ignorant of this fact. See, also, Miller *v.* Ottaway, 81 Mich. 196; 45 N. W. 465; Adams *v.* Smith, 35 Me. 324; Kelso *v.* Frye, 4 Bibb, 493; Dow *v.* Tuttle, 4 Mass. 414; Davis *v.* McCready, 17 N. Y. 230; Tied. Com. Paper, § 42, and cases cited. If the breach had occurred to the knowledge of the indorsee when he purchased he would not, of course, be protected. The settled rules of law governing commercial paper, upon the stability of which alone can the usual business of the country be transacted, cannot be disregarded in order to relieve a few unwary persons from the result of transactions into which they have been drawn by their own credulity or cupidity. Upon careful consideration we think the contract afforded no defense to the note which was purchased before a breach occurred.

3. The next question is whether plaintiff is estopped by his statements and conduct to dispute the validity of the notes in the hands of defendant. If, at the time the representations were made, there had already been a breach of the contract, or other defenses existed, it would have been the duty of plaintiff to have spoken, and, not having done so then, he should not thereafter be allowed to deny the truth of his representations. But at the time the representations were made there had been no breach of the contract, and plaintiff, so far as appears, had no reason to suspect that one would occur. The representations can be taken, then, as referring to the existing status of the note, and to defenses then known, and did not exclude such as might subsequently arise. Daniel Neg. Inst., § 860, and the following cases cited, which fully sustain the text: Maury *v.* Coleman, 24 Ala. 382; Cloud *v.* Whiting, 38 Ala. 57; Allen *v.* Frazee, 85 Ind. 283; Koons *v.* Davis, 84 Ind. 389. If plaintiff had made an absolute promise to pay the note, he might have precluded himself from making defenses subsequently arising. Defendant's own testimony did go so far as to claim an absolute promise. He states that when he told plaintiff that he was about buying the notes he replied: "I wish you would trade for them, then they will be right here, and as soon as my family gets able I will try to make the money and pay them off. I will consider you an innocent purchaser; and wish you would get them." Plaintiff testified: "I told him that Mr. Chase had promised to keep the notes himself, but, as he had traded them off already, I suppose I would as soon he would have them as anybody else." We think the probability is that the statement of plaintiff is nearest correct, and that there was no absolute promise to pay the note.

4. The controlling question is whether the defendant had notice of the fraudulent intent of Chase, or participated in accomplishing it. The fraudulent scheme of Chase was well developed by the evidence. His efforts were directed to inducing parties to

enter into an agreement to manage the sale of a book in certain localities, and, by pointing out the profits they could realize by purchasing a lot of books, the sale of which they could control themselves, to obtain from them negotiable notes payable in the future. He remained in the neighborhood, furnishing to the parties taking hold of the scheme books as they were sold until he had obtained all the notes he could procure. He then sold the notes, left the neighborhood, and refused to furnish books to those who had purchased. He boarded at a hotel in Centralia. Defendant frequently visited him at his hotel. This he admitted. Said he went because he "liked to hear him go over his prospectus." Defendant introduced Chase to plaintiff. He hunted him up for that purpose. On the introduction he went to the hotel, and was present during a part of the interview between them. For this introduction Chase paid him $50. He told a friend, who upbraided him with getting plaintiff into trouble, that he had a "right to work for a commission as much so as anybody else had in any other kind of business." Defendant testified that he told plaintiff that if he did not get the books he would not be hurt, for it was written in the contract that in that event the note would be null and void. "He asked me if it was written on the note, and I told him that it was not. He said if that was written on the note, then Mr. Chase could not trade it off." It will be observed that the fraud of Chase was not in the character of the contracts made, but in a predetermined intention, after obtaining and selling the notes, not to comply with the contract. This fact should be kept in mind in considering the good faith of Bush in the matter. It is insisted that the evidence establishing the foregoing facts fixes upon defendant Bush the knowledge of the fraudulent intent of Chase, and we would be of that opinion if it disclosed all the facts and circumstances in the case. The fact that Chase paid Bush $50 for an introduction to Jennings, standing alone, ought to be in itself a conclusion of knowledge of, if not participation in, the intended fraud. But that fact does not stand alone. It seems from the evidence to have been well understood — in fact, no secret was made of it in the neighborhood — that any person would be paid by Chase a like commission for introducing one who would enter into a contract such as plaintiff made. Jennings admitted that he was informed, before he entered into the contract, that Bush was to be paid for introducing him. He himself afterwards obtained a reward for introducing a Mr. Green to Chase, and admitted that he had also tried to induce others to make contracts. If we charge defendant with notice of the fraud, we must also charge plaintiff with knowledge. He disclaims such knowledge. Why, then, should we charge knowledge upon defendant? He paid nearly the face value for the note, which is a strong circumstance in his favor. We should attribute to each party honesty of purpose in the absence of proof to the contrary. It is evident, we think, from all the circum-

stances, that both parties honestly believed, when the transfer of the note was made, that the contract would be fully performed. We think from the evidence before us that the defendant at most had a mere suspicion that the contract would not be carried out. This, as has been seen, was not sufficient to stamp his purchase with bad faith. The question of right between these parties is undoubtedly a close one. The case was evidently tried by plaintiff upon the theory that notice of the contract and the indorsement thereon was sufficient to charge defendant with bad faith in buying the note. Upon a trial of fact by a chancellor, when the evidence is so nearly balanced, we are not disposed to disturb the result reached; but in this case, in which no specific findings were asked by counsel or made by the court, we cannot determine whether the finding was upon the question of notice or was controlled by some of the legal propositions herein discussed. With the view we take of the law, we are not satisfied with the finding. We therefore reverse the judgment, and remand the cause for a retrial, if the parties desire it. All concur, except Barclay, J., who is absent.

Liability to Bona Fide Holder of One Who Signs a Note or Bill in Blank, which is Delivered to Another to Fill Up.

Geddes *v.* Blackmore, 132 Ind. 551 (32 N. E. 567).

OLDS, J. The appellee, Charles Blackmore, brought this action against the appellants Daniel T. Geddes and William Winder on a promissory note dated August 15, 1884, due in one day after date, payable to said Charles Blackmore, for $1,000, with 8 per cent interest, and signed by said Daniel T. Geddes and William Winder. Geddes was defaulted, and Winder answered in three paragraphs: First, a general denial; second, a general plea of *non est factum;* and, third, setting up an alteration of the note. There was a trial by jury, and a special verdict returned. The facts found by the jury in their special verdict show that the appellant William Winder signed a printed blank form of promissory note, the date of the note, date of maturity, amount, and name of payee all being blank; and intrusted it to Geddes, with verbal instructions to purchase hogs for a firm composed of said William and Asbury Winder, and to fill the blanks in the note, and deliver the same to the person from whom he purchased hogs, filling the dates. The amount and name of the payee were to be filled by inserting the amount to be paid for the hogs and the name of the person from whom the hogs were purchased. Geddes violated his instructions, and used the note to borrow $1,000 of appellee, Blackmore, filling the blank amount at $1,000, and the name of Blackmore as payee. He filled the other blanks, and signed the note himself as one of the payors, delivered the same to Blackmore, and received from him $1,000. Geddes purchased no hogs

of Blackmore, and did not use any of the money for the purchase of any hogs for said William Winder or the firm of Winder & Winder; and neither Winder nor Winder & Winder received any of the money. That the use made of the note was unauthorized by Winder, and was without his knowledge and contrary to his instruction. Both the appellee and the appellant Winder moved for judgment on the special verdict, and the court overruled the motion of Winder and sustained the motion of the appellee, Blackmore, and rendered judgment in his favor for the amount found due on the note. These rulings of the court on the motions for judgment are assigned as errors.

The facts found show that Geddes violated the confidence reposed in him by appellant Winder, disobeyed his instructions, and used the note for another purpose than that for which it was intended, but, notwithstanding such violation of confidence, the appellant is liable on the note. In Roberts *v.* Adams, 8 Port. (Ala.) 297, the court says: "No rule can be better settled than the one which determines that he who signs his name to a blank piece of paper with intent to be filled up as a note or indorsement will be liable, although the person intrusted therewith shall violate the confidence reposed in him by filling it up with another sum, or using it for another purpose, than the one intended;" and many authorities are cited in support of this doctrine. The same rule is adhered to by this court. In Wilson *v.* Kinsey, 49 Ind. 35, it was held that when a party signed a promissory note in blank and intrusted it to another to discount the note at bank, a blank being left for the name of the payee, and the note was negotiated to a third party, and his name inserted as payee, the person so signing the note was liable. In that case Kinsey signed the note, and intrusted it to one Butler to negotiate; and the court says: "We do not doubt, in view of the evidence, that when the note was signed Butler intended to negotiate it at the bank; but we find no evidence of any agreement between him and Kinsey that he should not negotiate it elsewhere. Had Kinsey insisted upon any such thing, it seems probable that, when the subject of restricting the authority of Butler was under consideration, he would have insisted upon having the blank for the name of the payee filled, as well as the ones which he insisted on having filled before he parted with the paper. This he did not do, but permitted the paper to go out into the market as it was. In that condition it fell into the hands of Wilson, who paid value for it, and who, as we think, is not charged with notice of anything which can affect his right to recover upon the note." Cornell *v.* Nebeker, 58 Ind. 425, supports the same doctrine. In this case Geddes was not restricted to fill in the name of any particular person as payee, or to any amount. It is true he was intrusted with the note for the purpose of filling in the blank, and to negotiate it in payment of hogs, to be purchased by him for the firm of Winder & Winder; but he was intrusted with the blank with authority to fill the

blanks, and negotiated it for a particular purpose, and he violated the confidence reposed in him, and negotiated it for another purpose. Winder, by the signing of the note in blank, and intrusting it to Geddes to fill the blanks and negotiate it, placed it in the power of Geddes to accomplish just what he did accomplish, viz., fill the blanks, and negotiate it to Blackmore, and secure a loan of $1,000; and the rule seems to be well settled that when a person signs his name to a blank note, and intrusts it to another, he thereby gives such person authority to fill it up in any manner he pleases, not inconsistent with the character of such blank paper, and a party taking it will be protected. See Davis *v.* Lee, 26 Miss. 505; Abbott *v.* Rose, 62 Me. 194. Nor do we think Winder was relieved from liability by reason of the fact that Geddes signed his own name to the note as one of the payors or makers. Winder by intrusting the note to Geddes, authorized him to fill the note out in any manner he pleased, not inconsistent with the character of such blank. The filling of it as he did, and signing his own name with that of Winder as payee, was perfectly consistent with the character of the blank so signed by Winder. It enabled Geddes to do just what the facts found show that he did do. He first met Blackmore on the street, and informed him that he would probably want to make the loan of him on a note signed by Winder, then filled the blanks, and signed it himself, and negotiated it, and obtained the money upon it. The fact is found that on the same day Winder was also in town, and that Blackmore knew it, and made no mention of the fact in regard to the loan to Winder; but this fact carries no notice to Blackmore of the unauthorized use of the paper, but rather conveys to him knowledge that Winder was within reach, so that Geddes could and had procured his signature for the purpose of the loan. There is a general finding at the close of the verdict that Winder did not execute the note, but, in view of the form of the verdict, this must be treated as a mere conclusion drawn from the other facts found. As all the facts relating to the signing, delivery, filling blanks, and knowledge and instructions are very fully set out and found by the jury, and it is clearly apparent that the latter statement is intended as a conclusion drawn from the facts previously stated and found by the jury, we think there was no error in the rulings of the court on the motions for judgment. Judgment affirmed, with costs.

Bank not a Holder for Value which Discounts Paper and Places Amount to Credit of the Depositor and Indorsee.

Dreilling *v.* First Nat. Bank, 43 Kan. 197 (23 P. 94).

HOLT, C. This was an action in the Ellis district court on a negotiable promissory note. Trial by jury. The court directed them peremptorily to find for the plaintiff for the unpaid balance

of the note. The defendants, as plaintiffs in error, complain of this direction of the court, and of certain rulings concerning the pleadings. The action was commenced by the First National Bank of Battle Creek as plaintiff. Afterwards the court permitted a supplemental petition to be filed, wherein none of the allegations of the original petition were repeated upon which the plaintiff relied to recover, but simply stated that after the commencement of this action the First National Bank of Battle Creek and the Second National Bank of Battle Creek had been consolidated under the name of "The National Bank of Battle Creek." This supplemental pleading was authorized by section 144, Civil Code. Clark *v* Spencer, 14 Kan. 398; Simpson *v.* Vose, 31 Kan. 227; 1 Pac. Rep. 601.

The defendants answered the original petition by a sworn denial, and also by setting up other matters of defense. The plaintiff replied by a general denial. After the supplemental petition was filed, the defendants again answered fully as to the merits of the action, but set up no new matter, only more elaborately and fully stating their defenses as set forth in their first answer. After this second answer there was no reply filed. None was necessary. The allegations of the answer had been once denied substantially by the reply to the defendants' original answer. This was sufficient. Brookover *v.* Esterly, 12 Kan. 149; Cooper *v.* Machine Co., 37 Kan. 231; 15 Pac. Rep. 235.

At the trial the plaintiff showed that it bought the note before due without knowledge of any defenses there might be to it. The note was given in payment of a threshing-machine. In the sale of this machine a warranty was given; and the defense urged was that there had been a breach of the warranty, and therefore a failure of consideration. The court required of the defendants, before proof of this warranty and its breach could be offered, that they should show that the note was either transferred after due, or else was not transferred for a valuable consideration; or that, if plaintiff took it before due, he took it with notice of the defenses which defendants had against it. The defendants proffered evidence to show the warranty and its breach, but neither offered or attempted to establish either one of the three propositions suggested by the court.

The defendants complain of this ruling, first, because the court arbitrarily directed their order of proof. It had the right to do so, and did not abuse its discretion in its requirements. In fact, it was the proper order for the court to make. Ordinarily, a party has latitude in introducing his testimony; but in this case it would have been an idle thing to have introduced testimony concerning the warranty and its breach when it had been fairly established, by evidence prima facie, that plaintiff was a bona fide purchaser of the note before maturity. All defenses which might have been urged against the original payee thereof were cut off in an action by the holder, who purchased before maturity, without notice, and for a valuable consideration.

The defendants urge, secondly, that the evidence offered by the plaintiff does not show it to have been a bona fide purchaser of the note. The testimony established that the First National Bank of Battle Creek took this note at its face value before due, and gave Nichols, Shepherd & Co., the original payees of the note, credit on their account. When the note was taken, Nichols, Shepherd & Co. had a balance at the bank to their credit of over $10,000; and it was proven that up to the time of this action their balance had never been less that $10,000. The testimony of Victor P. Collins, president of the bank, shows that the amount of the credit of Nichols, Shepherd & Co. at the bank when this note was placed to their credit has since been drawn out many times, and replaced by new deposits, so that the amount to the credit of Nichols, Shepherd & Co., though often changed in character, had not been materially diminished in amount, but had been kept good by other notes, drafts, and moneys deposited subsequently. It is probably true that simply discounting a note, and crediting the amount thereof on the indorser's account, without parting with any value for it, is not enough to constitute such bank a bona fide purchaser of the note. In this instance, however, this transaction was simply placing the note to the credit of Nichols, Shepherd & Co. alone; for they subsequently checked against it, and exhausted the amount of their credit at the time this note was placed to their account, including the amount of this note. We think the fact of thus paying out the full amount makes them purchasers. It is conceded that the bank did not buy the note outright, and pay for it, at that time; but they certainly were debtors to Nichols, Shepherd & Co. for its amount; and the general rule as to the application of payments, when there are no special facts to interfere, is that the first payments go to the oldest debts. Under this rule, the bank paid for it by allowing Nichols, Shepherd & Co. to check against and exhaust the amount of their credit at that time. This note was a part of that credit. It paid for it by cashing checks drawn upon it, and thus became a purchaser of the same for value. Fox *v.* Bank, 30 Kan. 441; 1 Pac. Rep. 789; Mann *v.* Bank, 30 Kan. 412; 1 Pac. Rep. 579; Rand. Com. Paper, § 994.

The other errors complained of do not require mention, and we recommend that the judgment be affirmed.

Per Curiam. It is so ordered; all the justices concurring.

What is Meant by Usual Course of Business.

Roberts *v.* Hall, 37 Conn. 205.

Carpenter, J. The facts of this case are briefly these: The note in suit is one of two notes, given for the purchase-money of certain property sold to the defendant by one Yale. The defendant was induced by fraud to give his notes for $700, for property which was worth but $400. The day after the sale the

fraud was discovered by the defendant, who thereupon offered to return the property to Yale, and demanded a return of his notes, but Yale refused to accept the property and return the notes. The other note, and $79 of this note, were paid to Yale from the avails of certain collaterals, which payments exceeded the value of the property. This note, before due, was transferred to the plaintiff, in trust for the payment of certain creditors named, with a balance payable to the wife of Yale, who was then living apart from her husband, and who has since been divorced. The creditors assented to the trust, and directed the plaintiff to commence and prosecute this suit. The note is more than sufficient to pay the creditors named, so that if collected there will be a balance to be paid to the wife. The plaintiff had no knowledge of the fraud, and took the note in good faith for the purposes stated. There was no consideration for the transfer except the claims of the creditors. Whether the payee was or was not, at the time of the transfer of the note, insolvent, does not appear.

Upon these facts the superior court rendered judgment for the plaintiff. The court therefore must have decided that the plaintiff took the note in good faith, for a valuable consideration, and in the regular course of business.

The case presents two questions:—

1. Is the plaintiff to be regarded as a trustee for the creditors, or the agent of the payee? If the latter, it is conceded that the plaintiff is not entitled to recover; if the former, then the plaintiff insists upon his right to recover and the defendant denies it.

We think the plaintiff, to a certain extent, is a trustee for the creditors. The auditor has clearly found that the note was transferred to the plaintiff in trust for the creditors and Mrs. Yale, and that the creditors ratified and confirmed the transfer, and that the plaintiff is following their directions in bringing and prosecuting this action.

In respect, however, to that portion of the note which was payable to Mrs. Yale, we are clearly of the opinion that he was the agent of the payee, and was in no sense a trustee for creditors. The ordinary relations between husband and wife will be presumed to have existed in this case until the contrary appears. It is only found that they were living apart, and have since been divorced. No indebtedness from him to her is found; and, so far as appears, the money, as soon as paid to her, would have been subject to his control. The legal effect of the transaction then, so far as it relates to this question, is the same that it would have been if the balance had been payable to him. To the extent of that balance, therefore, the judgment is clearly erroneous, and it must be reversed.

2. Was this note taken in the regular course of business?

In the discussion of this question we shall not controvert the legal proposition that a negotiable note transferred before due in

the regular course of business to a creditor, in payment of, or as security for, a pre-existing debt, is taken in good faith and for a valuable consideration, and is collectible in the hands of the creditor, notwithstanding any equities existing as between the original parties thereto. That question has been correctly settled in this State, and elsewhere, and we have no disposition to disturb it. Bush *v.* Scribner, 11 Conn. 388; Bridgeport City Bank *v.* Welch, 29 Conn. 479.

Nor do we place our decision upon the ground that this note was obtained by fraud. We suppose the general rule to be that fraud is not available as a defense in cases of this character. To this rule, however, there are exceptions. Foster *v.* Mackinon, Law Rep., 4 C. P. 704; Nance *v.* Lary, 5 Ala. 370.

But it is not material to our present purpose to inquire whether this case falls within those exceptions. Our object is rather to consider whether the rule of law which exempts commercial paper from legal defenses applies to a case like this. We think it is pertinent to that inquiry to call attention to the fact that this note was obtained by fraud, and that the contract was not only voidable, but was actually avoided by the maker immediately upon discovering the fraud. We need not say that it is the duty of the court to protect the maker, and prevent the consummation of the fraud, if it can be done consistently with the rules of law.

The only difficulty that we can perceive is, in preserving unimpaired the rule of law giving immunity to negotiable paper and the principles upon which it rests. That rule does not protect paper which was not taken in the usual course of business. That phrase, as Mr. Parsons in his work on "Notes and Bills," Vol. I, p. 256, justly remarks, is open to some objection, for the reason that it does not clearly indicate what are the legitimate uses of negotiable paper. The question is variously expressed in the books: "Was it in the course of trade?" "Was it in the ordinary and regular course of business?" "Was it a transaction which the law views as according to the usage of merchants?"

A more definite idea of its meaning may be had, however, by stating the question more specifically. Is negotiable paper ordinarily used in the way and manner in which this was used? Would a business man of ordinary intelligence and capacity receive commercial paper, when offered for the purposes for which this was transferred, as money, and upon its credit part with his property? Or would he at once suspect the integrity of the paper itself, and the credit and standing of the party offering it? A correct answer to these questions must settle conclusively the mercantile character of this transaction.

The fundamental principle of the law, applicable to negotiable paper, is that it is the representative of money, and may be used in all mercantile transactions as its substitute. But when used for any purpose outside the usual and ordinary

course of business, it ceases to carry with it the privileges and immunities with which the law clothes negotiable paper. The tendency of the law, in respect to the legitimate uses of negotiable paper, is thus referred to in 1 Parsons on Notes and Bills, p. 257: "And therefore we are disposed to believe that the law of this country is tending toward the rule that whether negotiable paper is sold, or discounted, or indorsed over to pay a new debt, or for a new purchase, or to secure new debt, or an old debt, or to pay an old debt, it becomes in each case the property of the holder, and carries with it all the privileges of negotiable paper, unless there be something in the particular transaction which is equivalent to fraud, actual or constructive." It will be noticed that this language is comprehensive, and was doubtless intended to embrace every instance in which such paper may be used and still retain its privileges. But it is not sufficiently broad to cover this case, as we shall presently see.

The doctrine that commercial paper may be properly used as security for a pre-existing debt has been disputed, and there are conflicting decisions upon that point; but it is now pretty generally established. The profession, however, did not readily acquiesce in the doctrine, inasmuch as there is an apparent hardship in allowing the holder of such paper, who parted with nothing upon its credit, to recover of one who, as against other parties, has a good defense. The reason upon which this doctrine rests, and without which the law would undoubtedly have been determined otherwise, is, that a very considerable portion of the negotiable paper made in business is used in this way. We can easily understand, therefore, that among business men, accustomed to deal in this kind of paper, the receiving or offering it as security for an old debt is not in itself calculated to excite suspicion, for the simple reason that it is according to usage; and if according to usage, presumptively at least, such use facilitates trade, and should receive the sanction of the courts unless there is some real and substantial objection to it.

But in the case before us no such usage appears. On the contrary, the purpose for which the paper was used is exceptional and unusual. We apprehend that cases like this are rarely to be met with in business circles. Let us examine it more carefully. A man has a piece of negotiable paper with which he wishes to pay or secure certain debts. If there is but one debt he can transfer it directly to the creditor, and the law protects the transaction. That is according to the usual course of business. But if he transfers to a friend, to hold till due, and then collect it, and with its avails pay the creditor, that is unusual and suspicious upon its face, and requires explanation. Unless some good reason can be shown for such a proceeding, the law ought not to protect it. But it is said that here were several creditors, which, it is claimed, sufficiently explains the

fact that the security was effected through the intervention of a trustee. Let us test this position. If the paper is right and free from defects, why not sell it in market or get it discounted, and with its avails pay the debts at once? Or, if the debts are not to be paid until the paper is due and collected, why not retain it in his own hands until due, and if necessary sue and collect in his own name? Such a course would be natural and usual. But what honest reason can be suggested why it should be transferred to a third party, who has no interest in the matter, to be sued in his name? Such a course is unusual, and not in the course of trade. The transaction at once suggests the idea that there is some equity in favor of the maker inherent in the note itself, and which can be made available as against the payee, and which the payee is seeking to avoid.

But there is another circumstance appearing in the case which makes the unusual character of the transaction still more apparent. The creditors are informed of the transfer, they ratify and confirm it, and direct the commencement and prosecution of this suit. What occasion is there for all this, except to make it appear that the plaintiff is a trustee for the creditors? And why is it desirable that it should appear that he is a trustee for the creditors, unless for the very purpose of shutting out this defense? If Yale was in fact solvent, this proceeding was extraordinary and inexplicable upon any theory consistent with honesty and fair dealing. At least no sufficient reason for it appears in the case. If he was insolvent, another and insurmountable difficulty is at once encountered. The conveyance, not being in conformity to the provisions of our insolvent law, and operating to pay the creditors named in full, thereby giving them a preference, contravenes the policy of that law, and is therefore void as against creditors. Surely it will not be contended that such a conveyance should receive the sanction of this court as a legitimate mercantile transaction.

The fact that a part of this money was payable to the wife of Yale is worthy of notice also in this branch of the case. To that extent, as we have already seen, the plaintiff was the agent of Yale. We have no occasion to say that this circumstance alone renders this conveyance void at common law. But if there was a secret trust in favor of Yale, and the operation of the conveyance should be to defraud creditors, it certainly would be void as against creditors. A fraudulent conveyance can in no sense be said to be in the usual course of business. But be this as it may, the fact that Yale himself is still interested in this note, either in his own right or in right of his wife, should suggest to all parties concerned an inquiry as to the reason and occasion of this conveyance.

We are not referred to any case directly in point, and are not aware that any exists; but we believe the views above expressed are in harmony with reason and good sense, and not in conflict with any adjudged case. In Billings *v.* Collins, 44 Maine, 271,

it was held that the assignment of negotiable paper, by operation of a bankrupt or insolvent law, was not in the regular course of trade, and that the assignee could only acquire the rights of the insolvent. The opinion of the court is brief, simply announcing the result without adducing any argument in its support; but we have no reason to doubt the correctness of the decision. So far as it goes it supports our position in the present case.

For these reasons, after careful consideration, we have come to the conclusion that this note was not taken in the regular course of business, and that the judgment of the court below upon that ground was erroneous, and must be reversed.

Transferee of Certified Check Payable to Order, Unindorsed, Takes Check Subject to all Defenses.

Goshen Nat. Bank *v.* Bingham, 118 N. Y. 349 (23 N. E. 180).

Appeals from judgments rendered by the general term of the supreme court of the first department, affirming judgments entered upon the reports of a referee.

On November 27, 1884, Benjamin D. Brown applied to the cashier of the Goshen National Bank, at Goshen, N. Y , to cash a sight-draft for $17,000, drawn by him upon the firm of William Bingham & Co., of New York, accompanied by a quantity of the bonds of the West Point Manufacturing Company, of the face value of $17,000. Brown represented that he had negotiated a sale of these bonds at their face value with William Bingham & Co.; that they had directed him to draw upon them at sight for $17,000, the draft to be accompanied by the bonds, and that the draft would be paid upon presentation. Such representations were absolutely false. The bonds had no market value. Brown was a bankrupt, and had no funds in the bank, except such as resulted from the credit given him upon the faith of the draft on Bingham & Co., accompanied by the bonds. The cashier of the Goshen National Bank, relying upon such representations, cashed the draft of $17,000, and placed the proceeds to the credit of Brown, upon the books of the bank. He gave Brown sight-drafts on New York for $12,000, and certified a check drawn by Brown to his own order, dated November 26, 1884, for $5,000. On the morning of November 28th, Brown called at the office of William Bingham & Co., and stated that he wanted to get some currency. Mr. Bingham passed the check to the firm's cashier, directing him to give Brown currency for the amount. The cashier gave him a check drawn on the Corn Exchange Bank for $5,000. Brown had the check cashed at the Corn Exchange Bank. He also had the New York drafts cashed, amounting to $12,000, which he had obtained from the Goshen National Bank. After procuring the checks and drafts to be cashed, he fled to Canada, where he remained at the time of the trial of these actions. When Bingham & Co. took from Brown the check cer-

tified by the Goshen National Bank, it was not indorsed. The referee found that, "at the time of the transfer of the said certified check by Brown to the plaintiffs, it was intended both by Brown and the plaintiffs that said certified check should be indorsed by Brown, and it was supposed by both parties that he had so indorsed it; and, if the plaintiffs had known that it was not indorsed, they would not have paid the consideration therefor." He further found "that Brown made no statement to the defendants, or either of them, at the time of the transfer of the check, * * * that such check was indorsed;" and, "prior to the commencement of the action of replevin, the defendants never requested Brown to indorse said check." While Bingham & Co. held the check in question unindorsed, a demand for its return to the bank, accompanied by a full explanation of the circumstances under which the certification was obtained, was made upon Bingham & Co. in behalf of the bank; and, upon their refusal to return it, an action to recover its possession was commenced by the bank against Bingham & Co. That action is firstly above entitled. Subsequently, and on December 16th, Bingham & Co. obtained from Brown a power of attorney to indorse the check. Pursuant thereto, the check was indorsed, and payment thereafter demanded of the bank. This was refused, and thereupon the action secondly above entitled was commenced by Bingham & Co. to recover the amount of the check.

PARKER, J. (*after stating the facts as above*). As against Brown, to whose order the check was payable, the bank had a good defense. But it could not defeat a recovery by a bona fide holder, to whom the check had been indorsed for value. By an oversight on the part of both Brown and Bingham & Co., the check was accepted and cashed without the indorsement of the payee. Before the authority to indorse the name of the payee upon the check was procured, and its subsequent indorsement thereon, Bingham & Co. had notice of the fraud, which constituted a defense for the bank as against Brown. Can the recovery had be sustained? It is too well settled by authority, both in England and in this country, to permit of questioning, that the purchaser of a draft of check who obtains title without an indorsement by the payee holds it subject to all equities and defenses existing between the original parties, even though he has paid full consideration, without notice of the existence of such equities and defenses. Harrop *v.* Fisher, 30 Law J. C. P. 283; Whistler *v.* Forster, 14 C. B. (N. S.) 248; Savage *v.* King, 17 Me. 301; Clark *v.* Callison, 7 Ill. App. 263; Haskell *v.* Mitchell, 53 Me. 468; Clark *v.* Whitaker, 50 N. H. 474; Calder *v.* Billington, 15 Me. 398; Bank *v.* Taylor, 100 Mass. 18; Gilbert *v.* Sharp, 2 Lans. 412; Hedges *v.* Sealy, 9 Barb. 214–218; Bank *v.* Raymond, 3 Wend. 69; Raynor *v.* Hoagland, 39 N. Y. Super. Ct. 11; Muller *v.* Pondir, 55 N. Y. 325; Freund *v.* Bank, 96 N. Y. 352; Trust Co. *v.* Bank, 101 U. S. 68; Osgood

v. Artt, 17 Fed. Rep. 575. The reasoning on which this doctrine is founded, may be briefly stated as follows: The general rule is that no one can transfer a better title than he possesses. An exception arises out of the rule of the law-merchant as to negotiable instruments. It is founded on the commercial policy of sustaining the credit of commercial paper. Being treated as currency in commercial transactions, such instruments are subject to the same rule as money. If transferred by indorsement, for value, in good faith and before maturity, they become available in the hands of the holder, notwithstanding the existence of equities and defenses which would have rendered them unavailable in the hands of a prior holder. This rule is only applicable to negotiable instruments which are negotiable according to the law-merchant. When, as in this case, such an instrument, is transferred, but without an indorsement, it is treated as a chose in action assigned to the purchaser. The assignee acquires all the title of the assignor, and may maintain an action thereon in his own name; and, like other choses in action, it is subject to all the equities and defenses existing in favor of the maker or acceptor against the previous holder. Prior to the indorsement of this check, therefore, Bingham & Co. were subject to the defense existing in favor of the bank as against Brown and the payee. Evidence of an intention on the part of the transferee to indorse does not aid the plaintiff. It is the act of indorsement, not the intention, which negotiates the instrument; and it cannot be said that the intent constitutes the act.

The effect of the indorsement made after notice to Bingham & Co. of the bank's defense must now be considered. Did it relate back to the time of the transfer, so as to constitute the plaintiffs holders by indorsement as of that time? While the referee finds that it was intended both by Brown and the plaintiffs that the check should be indorsed, and it was supposed that he had so indorsed it, he also finds that Brown made no statement to the effect that the check was indorsed; neither did the defendants request Brown to indorse it. There was therefore no agreement to indorse. Nothing whatever was said upon the subject. Before Brown did agree to indorse, the plaintiffs had notice of the bank's defense. Indeed, it had commenced an action to recover possession of the check. It would seem, therefore, that, having taken title by assignment,— for such was the legal effect of the transaction, by reason of which the defense of the bank against Brown became effectual as a defense against a recovery on the check in the hands of the plaintiffs as well,— Brown and Bingham & Co. could not by any subsequent agreement or act so change the legal character of the transfer as to affect the equities and rights which had accrued to the bank; that the subsequent act of indorsement could not relate back so as to destroy the intervening rights and remedies of a third party. This position is supported by authority. Harrop *v.* Fisher, Whistler *v.* Forster, Savage *v.* King, Haskell *v.* Mitchell, Clark *v.* Whitaker, Clark *v.*

Callison, Bank *v.* Taylor, Gilbert *v.* Sharp, cited supra. Watkins *v.* Maule, 2 Jac. & W. 243, and Hughes *v.* Nelson, 29 N. J. Eq. 547, are cited by the plaintiff in opposition to the view we have expressed. In Watkins *v.* Maule the holder of a note obtained without indorsement collected it from the makers. Subsequently the makers complained that the note was only given as a guaranty to the payee, who had become bankrupt. Thereupon the holder refunded the money and took up the note, upon the express agreement that the makers would pay any amount which the holders should fail to make out of the bankrupt payee's property. The makers were held liable for deficiency. Hughes *v.* Nelson did not involve the precise question here presented. The views expressed, however, are in conflict with some of the cases cited; but we regard it, in such respects, as against the weight of authority. Freund *v.* Bank, supra, does not aid the plaintiff. In that case it was held that the certification by the bank of a check in the hands of a holder who had purchased it for value from the payee, but which had not been indorsed by him, rendered the bank liable to such holder for the amount thereof. By accepting the check the bank took, as it had the right to do, the risk of the title which the holder claimed to have acquired from the payee. In such case the bank enters into contract with the holder by which it accepts the check and promises to pay it to the holder, notwithstanding it lacks the indorsement provided for; and it was accordingly held that it was liable upon such acceptance, upon the same principles that control the liabilities of other acceptors of commercial paper. Lynch *v.* Bank, 107 N. Y. 183; 13 N. E. Rep. 775.

But one question remains. The learned referee held, and in that respect he was sustained by the general term, that the bank, by its certification, represented to every one that Brown had on deposit with it $5,000; that such amount had been set apart for the satisfaction of the check, and that it should be so applied whenever the check should be presented for payment; and that, Bingham & Co., having acted upon the faith of these representations, and having parted with $5,000 on the strength thereof, the bank is estopped from asserting its defense. The referee omitted an important feature of the contract of certification. The bank did certify that it had the money, would retain it, and apply it in payment, provided the check should be indorsed by the payee. Lynch *v.* Bank, supra. If the check had been transferred to plaintiffs by indorsement, the defendant would have had no defense, not because of the doctrine of estoppel, but upon principles especially applicable to negotiable instruments. Bank *v.* Railroad Co., 13 N Y. 638. If the maker or acceptor could ever be held to be estopped by reason of representations contained in a negotiable instrument, he certainly could not be in the absence of a compliance with the provisions upon which he had represented that his liability should depend. But it is well settled that the maker or acceptor of a negotiable instrument is

not estopped from contesting its validity because of representations contained in the instrument. In such cases an estoppel can only be founded upon some separate and distinct writing or statement. Clark *v.* Sisson, 22 N. Y. 312; Bush *v.* Lathrop, Id. 535; Moore *v.* Bank, 55 N. Y. 41; Fairbanks *v.* Sargent, 104 N. Y. 108; 9 N. E. Rep. 870; Bank *v.* Railroad Co., supra.

The views expressed especially relate to the action of Bingham & Co. against the bank, and call for a reversal of the judgment. We are of the opinion that the action brought by the bank against Bingham & Co. to recover possession of the check cannot be maintained, and in that case the judgment should be affirmed. All concur, except Haight, J., not sitting.

Rights of an Indorsee after Maturity.

Watson *v.* Alley, 141 Ill. 284 (31 N. E. 419).

Scholfield, J. The controversy here is whether certain promissory notes purporting to be executed by the Superior Nickel Works, a corporation, to Louis Ellickson, and by him assigned before maturity to A. T. Bliss, and by Bliss assigned after maturity to Winfield N. Alley, are legal charges against the assets of the corporation in the hands of its receiver. The lower courts adjudged that they were, and decreed their payment by the receiver. Appellants contend that they are not, because the president and secretary of the corporation, who assumed to execute the notes, had no authority to thereby bind the corporation, and because, also, they were executed without any valid consideration, and Alley, being an assignee after maturity, took the notes subject to those defenses. The notes purport to contain each a power of attorney to confess judgment for the amount due thereon; but, since there is no attempt to do any act under and by virtue of these powers, it is unnecessary to consider that feature of the notes. It is not denied that notes may be executed lawfully by the president and secretary of a corporation, when they were executed in good faith to secure indebtedness of the corporation, lawfully incurred in the course of its business, and we are therefore under no necessity to cite authorities to show that this is the law; and, although Alley is an assignee after maturity, his assignor, Bliss, was an assignee before maturity, and Alley is entitled to stand in the place of Bliss, and no defense can be urged by the corporation, as against Alley, which it could not have urged against Bliss, had he remained the owner of the notes, and sought to enforce their collection. Woodworth *v.* Huntoon, 40 Ill. 131. See, also, Rand. Com. Paper, § 673, and authorities cited in note.

It only remains, then, to determine whether the defenses here urged would be good as against the rights of Bliss, were he, instead of Alley, attempting to enforce payment of these notes in this proceeding. In Comstock *v.* Hannah, 76 Ill. 535, we cited

with approval the following: "The party who takes it [commercial paper] before due, for a valuable consideration, without knowledge of any defects of title, and in good faith, holds it by a title valid against the world. Suspicion of defect of title, or the knowledge of circumstances which would excite such suspicion in the mind of a prudent man, or gross negligence on the part of the taker, at the time of the transfer, will not defeat his title. That result can only be produced by bad faith on his part. The burden of proof lies on the person who assails the right claimed by the party in possession." We followed this ruling in Shreeves *v.* Allen, 79 Ill. 553, and Murray *v.* Beckwith, 81 Ill. 43. The evidence here fails to show bad faith in Bliss in obtaining the assignment of these notes, but expressly proves the contrary. The utmost that can be said in that respect is that he might by inquiry have ascertained the consideration for which the notes were given. But this only proves that, in failing to make such inquiry, he was negligent, and, under what is quoted supra, is insufficient to affect him with notice. The only evidence upon the question is the testimony of Bliss himself. He testified that he received the notes from Ellickson, "two or three days or a week after their execution," in payment for indebtedness by Ellickson to himself for professional services as an attorney at law; that he did not know that the notes were in existence until Ellickson gave them to him; and that he subsequently gave the notes to Alley in payment of a debt which he owed Alley. He admits that he had been acting for the corporation and Ellickson, as their attorney at law, since the beginning of this suit, and that he did some work for them in that capacity before that time. There is not a particle of evidence in the abstract that he had actual knowledge of the consideration of these notes, or the circumstances under which they were executed, at the time they were assigned to him; and we cannot infer that he had such knowledge merely because he may have had an opportunity, by the exercise of diligence, to have obtained it. We find no error in the judgment of the appellate court. It is therefore affirmed.

Pledgee as an Indorsee and Bona Fide Holder — His Rights and Obligations.

Handy *v.* Sibley, 46 Ohio St. 329 (17 N. E. 329).

Error to circuit court, Hamilton county.

The original action was commenced in the court of common pleas of Hamilton county by the defendant in error, James W. Sibley, against Helen A. Handy, Mariette B. Handy, Charles E. Handy, Jennie A. Handy (now Jennie A. Rhodes), Anna W. Handy, and Eugene F. Williams, plaintiffs in error, and Truman B. Handy, to foreclose a mortgage as hereinafter set forth. On March 27, 1883, Helen A. Handy, Mariette B. Handy, Charles E. Handy, Jennie A. Handy, and Anna W. Handy, children of

Truman B. Handy, executed and delivered to their father their promissory note, a copy of which is as follows: —

"$25,000.00. CINCINNATI, March 27, 1883.

Ninety days after date we promise to pay to the order of Truman B. Handy, twenty-five thousand ($25,000) dollars, payable at the Citizens' National Bank at Cincinnati, with interest at 6 per cent per annum. Value received.

HELEN A. HANDY. JENNIE A. HANDY.
" MARIETTE B. HANDY. ANNA W. HANDY."
" CHAS. E. HANDY.

Indorsed: "TRUMAN B. HANDY."

This note was secured by a mortgage deed executed and acknowledged March 27, 1883, by the above-named makers of the note, conveying to Truman B. Handy certain described real estate owned by the mortgagors, and situated in the village of Clifton, in Hamilton county. The note and mortgage were executed to Truman B. Handy by his children, for his accommodation, and simply as surety for him, and to enable him to pledge the same as collateral, or, by having the same discounted, to obtain money for his convenience and accommodation, and for no other consideration. At the time of executing the mortgage the real estate therein described was unincumbered, and worth $100,000. On April 2, 1883, Truman B. Handy executed and delivered to James W. Sibley his promissory note and agreement, a copy of which is as follows: —

"$15,000.00. CINCINNATI, OHIO, April 2, 1883.

"Ninety days after date I promise to pay James W. Sibley, or order, fifteen thousand dollars, for value received; having deposited or pledged as collateral security for the payment of this note a note for twenty-five thousand dollars, secured by mortgage given me by Helen A. Handy, Mariette B. Handy, Chas. E. Handy, Jennie A. Handy, and Anna W. Handy. And I hereby give to the holder there of full power and authority to sell or collect at my expense all or any part or portion thereof, at any place, either in the city of Cincinnati or elsewhere, at public or private sale, at his option, on the non-performance of the above promise, and at any time thereafter, and without advertising the same or otherwise giving to me any notice. In case of public sale the holder may purchase without being liable to account for more than the net proceeds of such sale. TRUMAN B. HANDY."

Indorsed: "JAMES W. SIBLEY."

Truman B. Handy indorsed the note for $25,000, and duly assigned the mortgage securing the same to James W. Sibley, and deposited them with him, for the purpose and with the power and authority set forth in the above note and agreement of April 2, 1883. On June 9, 1883, Truman B. Handy and his children executed and delivered to Eugene F. Williams an assignment, of which James W. Sibley had notice, and to which he assented in

certain terms; a copy of which assignment and assent is as follows:—

"Know all men that whereas, Helen A., Mariette B., Charles E., Jennie A., and Anna W. Handy, did on the 27th day of March, 1883, execute and deliver to Truman B. Handy their certain promissory note for twenty-five thousand dollars ($25,000.00), and on the same day executed a mortgage to secure the same, payable ninety (90) days after the date thereof, with six (6) per cent interest upon certain real estate situated in Clifton, Hamilton county, Ohio, and being the same premises described in a mortgage executed by said Helen A. Handy and others to said Truman B. Handy, recorded in mortgage book 461, page 170, Hamilton county, Ohio, mortgage records; and whereas, said note and the mortgage securing the same were for a valuable consideration assigned and transferred by said Truman B. Handy to one J. W. Sibley to secure the sum of $15,000.00 and interest; and whereas, the said Truman B. Handy is indebted to one Eugene F. Williams in something over ten thousand dollars ($10,000.00), and being desirous of securing the same: Now, therefore, we do hereby agree and consent that the said Eugene F. Williams shall receive an assignment and transfer of ten thousand dollars of, in, and to said note and mortgage of $25,000.00, together with the interest thereon, the same being the surplus over and above the $15,000.00 due said Sibley, and the interest due him under said note and mortgage, and that said surplus of $40,000.00 and the interest accruing thereon, secured by said note and mortgage, shall be applied towards the payment of said indebtedness by said Truman B. Handy to said Williams, the said Williams, however, agreeing to extend the payment of his claim secured by this assignment for one year from the date hereof, and also agreeing to apply to the diminution of said indebtedness all dividends that he may receive from the late firm of Handy, Richardson & Company, of Chicago; interest to be allowed to the said Williams at the rate of 6 per cent per annum until the payment of the indebtedness hereby secured. Said Truman B. Handy hereby so assigns said note and mortgage, and joins in this agreement.

"TRUMAN B. HANDY. JENNIE A. HANDY.
"HELEN A. HANDY. ANNA W. HANDY.
"MARIETTE B. HANDY. EUGENE F. WILLIAMS.
"CHARLES E. HANDY. By JORDAN, JORDAN & WILLIAMS,
His Attorneys.

"I do hereby acknowledge the service upon me of notice of the above and foregoing assignment made by Truman B. Handy and others to Eugene F. Williams, dated June 9, 1883, and agree hereby to hold said note and mortgage, and deliver the same to said Williams, or his attorneys, Jordan, Jordan & Williams, or his legal representatives, upon the payment to me of fifteen thousand dollars, and interest thereon at 6 per cent from March 27, 1883, whether said $15,000.00 and interest be paid by said Tru-

man B. Handy or any other person. I sign the above with the agreement and understanding that nothing therein contained shall prevent me from enforcing my security at any time, or shall hold me responsible, in case other persons assert and maintain legal rights against said note or the proceeds thereof, or any part thereof. JAMES W. SIBLEY."

The note for $15,000 being past due and unpaid, James W. Sibley caused the note and mortgage for $25,000, pledged as collateral security for the payment thereof, to be offered at public auction sale, on July 21, 1883, at the chamber of commerce hall in Cincinnati, Ohio, and Sibley, being the highest and best bidder, purchased the note and mortgage of $25,000 for the sum of $15,000. The sale was made without the consent of the children of Truman B. Handy, none of whom had any notice or knowledge of the existence or terms of the power of attorney under which Sibley sold the pledged collaterals, until long after the sale; nor did they have any notice of the time or place of such sale, nor did they learn of such sale, until long after it was made. Notice of the sale of the pledge at the chamber of commerce was given to the attorneys of Eugene F. Williams, but not to him personally; and before the sale the attorneys of Williams informed Sibley by letter that they had not notified their client of the notice served upon them of the intended sale, and that therefore he had no knowledge of Sibley's purpose to offer the pledge for sale. The condition of the mortgage deed having been broken by reason of the non-payment at maturity of the note for $25,000, James W. Sibley filed his petition in the court of common pleas to foreclose the equity of redemption, and prayed that the premises described in the mortgage be sold, and that of the proceeds of such sale there be paid to him the amount due on the mortgage note, to wit: $25,000, with interest from March 27, 1883. Eugene F. Williams, who was made defendant in the foreclosure proceedings, claims in his answer that Sibley is entitled to receive out of the proceeds of the sale of the premises, as against him, the sum of $15,000, with interest, and no more. On appeal, the circuit court, upon an agreed statement of facts, which hereinbefore have been substantially set forth, adjudged and decreed the equities of the case to be with Sibley; that the note for $25,000 set forth in the petition, and the mortgage securing the same, belonged to Sibley; that he was entitled to a decree against the defendants for the full amount thereof, with interest; and that on failure to pay Sibley $27,802, and costs of suit, the mortgaged premises should be sold, and the last-named sum be paid from the proceeds of such sale. To reverse the judgment of the circuit court, this petition in error is now prosecuted.

DICKMAN, J. (*after stating the facts as above*). Independent of the power of sale vested in James W. Sibley, by the instrument of writing dated April 2, 1883, he would not have been authorized to sell at public or private sale the note and mortgage of $25,000, which Truman B. Handy had pledged as collateral

security for the payment of his note of $15,000. There is a distinction between a pledge of ordinary chattels and a pledge of commercial paper. A pledge of the latter as collateral security for the payment of a debt does not, in the absence of a special power for that purpose, authorize the pledgee to sell the securities so pledged upon default of payment, either at public or private sale. He is bound to hold and collect the same as they become due, and apply the net proceeds to the payment of the debt so secured. The reason assigned for this exception to the general rule in relation to the sale of property pledged is that such securities, not being usually marketable at their fair value, would generally be sold at a sacrifice, and injustice would thus be done the debtor; and it cannot be presumed it was the intention of the parties thus to deal with the securities. Wheeler *v.* Newbould, 16 N. Y. 392; Fletcher *v.* Dickinson, 7 Allen, 23; Nelson *v.* Wellington, 5 Bosw. 178; Brown *v.* Ward, 3 Duer, 660; Banking Co. *v.* Lewis, 12 N. J. Eq. 323; Steel Co. *v.* Brick Co., 82 Ill. 548; Zimpleman *v.* Veeder, 98 Ill. 613. Ordinarily, where there is a deposit of personal property as security, there is an implied power of sale upon default, upon giving reasonable notice to the debtor to redeem. But the pledgee of negotiable paper, who desires a more summary and speedy means of obtaining money from his security than by collecting the same when it falls due, or by a bill in chancery and a judicial sale under a regular decree of foreclosure, will obtain a special power of sale from the pledgeor. In enforcing his rights, however, by a sale of the pledge, he will be held to the strictest good faith in the execution of the power for the protection of the rights of the pledgeor, and will be charged with a trust for the benefit of the debtor, and the benefit of those to whom the debtor may have assigned his interest. It seems to be beyond controversy that the note for $25,000, secured by mortgage, and given by the children of Truman B. Handy to their father, was good for that amount, although purchased by Sibley at the sale for $15,000 only, that being the amount of the note for which the note of $25,000 had been pledged as collateral security. Upon foreclosure of the mortgage, and sale of the premises, it appears that a sum would be realized more than sufficient to pay the note of $25,000, sufficient to pay the principal and interest of the note of $15,000, and leave a surplus. The question arises whether Sibley, because of his sale and purchase of the pledge, shall be permitted to retain this surplus embraced within the note of $25,000 as his own property, or be held to account for it as trustee to Eugene F. Williams. The mortgage note of $25,000 was executed to Truman B. Handy by his children, solely for his accommodation, to enable him to pledge the same as collateral, or, by discount, to obtain money for his convenience, and for no other consideration. They executed the note and mortgage simply as surety for their father. They had no knowledge of the power of sale given by him to Sibley until long after the sale

of the pledge; nor did they have any notice of the time or place of such sale, or learn of the sale until long after it was made. We do not think that, under the circumstances, Sibley can subject their property to the payment of $25,000, when he loaned to their father only $15,000; or that he can retain the balance, $10,000, without any consideration therefor. Handy deposited or pledged the note and mortgage as collateral security for the payment of $15,000, and no more. If, at the maturity and non-payment of his claim, Sibley, without resorting to a sale of the pledge, had sought to enforce payment by foreclosure of the mortgage, he would have been entitled out of the proceeds of the sale of the premises only to the amount of his debt. He could not, by resorting to a sale of the pledge, enlarge his equities, or successfully invoke the aid of a court of equity, in an effort to exact from his debtor more than he owed him.

The principle is elementary, and as old as the Roman law, that if the creditor exercises his power of sale over the pledge he must give the surplus, after paying himself, to the debtor. D. 13. 7. 42 L.; Hunter Rom. Law, 439. And as between debtor and creditor, whatever may be the effect of a sale as to annulling all the debtor's residuary interest in a pledge of ordinary chattels, when a question arises as to the rights of third parties, who are makers of accommodation paper pledged as collateral security, such parties should not be required to pay the creditor more than the amount of his debt. It has been decided by the supreme court of Massachusetts, in Fisher *v.* Fisher, 98 Mass. 303, that if a promissory note, which is without consideration as between the original parties thereto, is delivered without consideration to another person, who pledges it before its maturity as collateral security for a debt of his own, of less amount than the face of the note, the pledgees, if they take it without notice, are to be deemed holders for value, and may maintain an action thereon for the amount due them upon the debt which it was pledged to secure. In the opinion of the court it was said: "The evidence established that the plaintiff received the note from the holder before its maturity, without any knowledge of the circumstances under which the defendants had delivered it to the payee, or the purpose for which the latter delivered it to the holder, and that it was held by the plaintiffs as collateral security for a valid debt due from the holder to them. Under the decisions of the court these facts proved that the plaintiffs were *bona fide* holders for value, and without notice, and were therefore entitled to recover to the extent of their debt for which the note was pledged as collateral security." In Duncan *v.* Gilbert, 29 N. J. Law, 527, it is stated as the rule that the holders of accommodation paper, assigned as collateral security, cannot recover of the accommodation maker any more than the consideration actually advanced. In Bank *v.* Doyle, 9 R. I. 76, it was held that, in case of accommodation paper pledged, the pledgee can recover of the maker only the amount of the debt due him from the pledgeor. And in Maitland

v. Bank, 40 Md. 540, the doctrine was laid down that, in an action against the maker of a promissory note, made for the accommodation of the indorser, brought by the indorsee, to whom it was passed as collateral security for the payment of notes discounted by the indorsee for the benefit of the indorser, the measure of the plaintiff's right of recovery is the amount due on the debts embraced by the security, and that it is incumbent on the plaintiff to show what debts were intended to be secured by the note, and the amounts remaining due in respect thereof. "Indeed," says Alvey, J., "all that the plaintiff is entitled to recover is the amount due on the debts intended to be secured, it being conceded that the note was taken as collateral security merely. In such case, while the plaintiff is entitled to be treated as a holder for value it is only so to the extent necessary to protect the debts intended to be secured."

The note executed by the children of Handy and pledged as collateral security, being only accommodation paper, and being held in pledge by Sibley, with no other lien upon it, they might, after the payment of the note of $15,000, have demanded the surrender or cancellation of the collateral. But by the assignment of June 9, 1883, it was agreed by and between Truman B. Handy, his children, and Eugene F. Williams, that there should be assigned and transferred to Williams $10,000 of and in the note and mortgage of $25,000, the surplus over and above the $15,000 due Sibley, which surplus should be applied towards the payment of Williams' claim against Handy; Williams, however, agreeing to extend the payment of his claim for one year from the date of the assignment. The record does not disclose that Williams had any knowledge of the power which Handy had vested in Sibley to sell at public or private sale the collateral note and mortgage, and to become the purchaser thereof. The terms of the assignment of June 9th, and of Sibley's written agreement attached thereto, would not bring such knowledge home to Williams, any more than to the children of Handy, and it is among the agreed facts that none of the children, until long after the sale of July 21, 1883, had notice or knowledge of the existence of such power of sale. So far as Williams knew, Sibley was a pledgee of negotiable paper secured by mortgage, with no special authority to sell the same as he would a pledge of ordinary chattels, but only empowered to pursue the usual course of foreclosure proceedings. The surplus, $10,000, was set apart to him, with the concurrence of all parties to the assignment, in view of a bona fide indebtedness to him by Handy, and for the valuable consideration that he would extend the payment of his claim against Handy. There is nothing in the record inconsistent with the presumption that the assignment to Williams of June 9, 1883, and the agreement by Sibley in relation thereto, were one and the same transaction. Williams having given a valuable consideration, Sibley was bound by his agreement to hold the note and mortgage, and deliver the same to Williams upon

receiving payment of $15,000, and interest. The proviso of Sibley that nothing contained in the writing signed by him should prevent him from enforcing his security at any time, would not be notice to Williams of a special power of sale, but might convey the meaning that the one year's extension of payment to Handy should not interfere with Sibley's right to enforce his security at any time by a regular foreclosure of the mortgage. And as between Williams and Handy, and the children of Handy, the equities of the children in the surplus of the note and mortgage, after paying Sibley's claim of $15,000, would, under the assignment of June 9th, follow and inure to the benefit of Williams. Nor do we conceive that the rights of Williams should be concluded in equity by the sale of the pledge under a power of which he was not cognizant at the time he agreed with Handy to extend the time for the payment of his claim against him, and which extension he might not have granted, if Sibley had definitely notified him, as he might have done, of his power to sell and purchase the pledged collaterals. The existence of the power of sale was a fact which, under the circumstances, Sibley, as a trustee, should have disclosed to Williams, and his failure to communicate the fact to him was contrary to the principles of equity. In our opinion the defendant in error, James W. Sibley, has no right to ask anything more than the full payment of his claim, with interest; and Eugene F. Williams is entitled to receive the surplus of the mortgage of $25,000 over and above the sum of $15,000, and interest, owing by Truman B. Handy to the defendant in error. Judgment reversed, and judgment for Eugene F. Williams.

CHAPTER X.

PRESENTMENT FOR PAYMENT.

SECTION 114. For what purpose, and as to whom is presentment for payment necessary.
115. By whom must presentment be made.
116. Possession as evidence of right to present for payment.
117. To whom should presentment be made.
118. The place of presentment.
119. The time of presentment — Days of grace.
120. Computation of time — Legal holidays.
121. The hour of the day for presentment.
122. Mode of presentment.

§ 114. **For what purpose and as to whom is presentment for payment necessary.**— The holder of a bill of exchange or of a promissory note almost invariably presents the paper to the acceptor or maker, respectively, for payment on the day of maturity; and there is a more or less popular notion that, if he fails to do this, at the proper time and in the proper way, the holder will lose all his rights in such paper as against all the parties to it. This is, however, not true as to the acceptor of a bill or maker of a note. They are primary obligors, and like all other primary debtors, their liability can be discharged only by payment, or the equivalent of payment, such as a legal release or the operation of the statute of limitation.

The general rule, therefore, is that a failure on the part of the holder to present the paper for payment on the day of maturity will not discharge the acceptor of a bill or the maker of a note; and this is true, even where the paper is made payable at a particular bank, or some other specified place; and the acceptor or maker can show that he had deposited sufficient funds to meet his obligation at the stipulated place of payment.[1] And this rule is

[1] Wolcott *v.* Van Santvoord, 17 Johns. 248 (8 Am. Dec. 396); Hills *v.* Place, 48 N. Y. 520 (8 Am. Rep. 568); Bank of the U. S. *v.* Smith, 11

rigorously enforced in the United States, even where the acceptor or maker has provided sufficient funds at the stipulated bank of payment, and the bank has failed subsequent to the maturity of the paper. The loss in such a case falls on the acceptor or maker, respectively, and the holder can nevertheless enforce payment of the bill or note.[1]

But where a place of payment is specified in the instrument, and the acceptor or maker can prove that he was at the place, on the day of maturity, ready to pay the amount, or had so deposited sufficient funds to enable the bill or note to be fully honored; the failure of the holder to present for payment will prevent any subsequent recovery of damages and costs, and subsequently accruing interest.[2]

Apart from the cases in which there is a stipulated place of payment, the failure to present for payment on the day of maturity will prevent the accrument of interest, where there is no stipulation in the paper for the payment of interest from date, and the paper is payable on demand. The interest will accrue in such a case only from the time when demand is made.[3] But where interest runs from the date, or the time of maturity is certain and fixed by the

Wheat. 173; Cox *v.* National Bank, 100 U. S. 704; Wilkins *v.* McGuire, 2 App. D. C. 448; Trammel *v.* Chipman, 74 Ind. 474; Yeaton *v.* Berney, 62 Ill. 617; Jillson *v.* Hill, 4 Gray, 316; Reeve *v.* Pack, 6 Mich. 240; Mayer *v.* Thomas, 97 Ga. 772 (25 S. E. 761); Callanan *v.* Williams, 71 Iowa, 363 (32 N. W. 383); Collins *v.* Trotter, 81 Mo. 275; Jackson *v.* Packer, 13 Conn. 342; Am. Nat. Bank *v.* Junk Bros. &c. Co., 94 Tenn. 62; 30 S. W. 753 (accommodation maker).

[1] Ward *v.* Smith, 7 Wall. 447; Adams *v.* Hackensack I. Co., 43 N. J. L. 638; (43 Am. Rep. 406); Williamsport Gas Co. *v.* Pinkerton, 95 Pa. St. 62; Wood *v.* Mechanics &c. Co., 41 Ill. 267 (1 Am. Lead. Cas. 478). But see Lazier *v.* Horan, 55 Iowa, 75 (7 N. W. 457).

[2] Murray *v.* East India Co., 5 B. & Ald. 204; Bacon *v.* Dyer, 12 Me. 19; Hills *v.* Place, 48 N. Y. 520 (8 Am. Rep. 568); Budweiser Brewing Co. *v.* Capparelli, 38 N. Y. S. 972; 16 Misc. Rep. 502; Mulherrin *v.* Hannum, 2 Yerg. 81; Lazier *v.* Horan, 55 Iowa, 75 (7 N. W. 457).

[3] Hunt *v.* Nevers, 15 Pick. 500 (26 Am. Dec. 616); Proctor *v.* Whitcomb, 137 Mass. 303; Hunter *v.* Wood, 54 Ala. 71; Breyfogle *v.* Beckley, 16 Serg. & R. 264; Estate of Bk. of Pennsylvania, 60 Pa. St. 471; Edgmon *v.* Ashelby, 76 Ill. 161; Walker *v.* Wills, 5 Ark. 166; Barough *v.* White, 4 B. & C. 327.

terms of the instrument, the failure to make presentment for payment at the proper time, will not prevent the accrument of interest from the day of maturity, or affect the holder's right to such subsequently accruing interest.[1]

The rule is, however, very different in respect to parties secondarily liable on a bill or note. These parties guarantee payment of the instrument, provided the presentment for payment is made when the paper falls due. For this reason, the failure to make presentment will discharge the drawer of a bill and the indorsers of a bill or note.[2] And where the paper is payable at a specified place, presentment elsewhere and not at that place, will not preserve their liability to the holder.[3]

The necessity for presentment is held to be so necessary to the perfection of the liability of an indorser, that it has been generally held that an indorser after maturity cannot be held liable on his indorsement, until a demand for payment has been made on the acceptor or maker.[4]

[1] Suffolk Bank *v.* Worcester Bk., 5 Pick. 106; Sweet *v.* Hooper, 62 Me. 54; Flanders *v.* Chamberlain, 24 Mich. 306; Joyner *v.* Turner, 19 Ark. 690; Staynor *v.* Knowles, 82 Ind. 157; Laughlin *v.* Wright, 63 Cal. 113.

[2] Nat. Shoe & Leather Bk. *v.* Gooding, 87 Me. 337 (32 A. 967); Presby *v.* Thomas, 1 App. D. C. 171; Jaffray *v.* Krauss, 79 Hun, 449; Cayuga Co. Bk. *v.* Warden, 1 N. Y. 413; Duncan *v.* McCullough, 4 Serg. & R. 480; Peabody Ins. Co. *v.* Wilson, 29 W. Va. 528 (2 S. E. 888); Burritt *v.* Tidmarsh, 5 Bradw. 341; Bowers *v.* Indust. Bk., 58 Ill. App. 498; Magruder *v.* Union Bank, 3 Pet. 87; Otto *v.* Belden, 28 La. Ann. 302; Los Angeles N. B. *v.* Wallace, 101 Cal. 286 (36 P. 197); Hoffman *v.* Hollingsworth, 10 Ind. App. 353 (57 N. E. 960). And the holder not only loses his remedy against the drawer or indorser on the bill or note itself, but likewise on the original contract. Adams *v.* Darby, 28 Mo. 162; 75 Am. Dec. 115 (drawer).

[3] Bank of U. S. *v.* Smith, 11 Wheat. 171; Cox *v.* National Bank, 100 U. S. 704; Shaw *v.* Reed, 12 Pick. 132; Lawrence *v.* Dobyns, 30 Mo. 196.

[4] Berry *v.* Robinson, 9 Johns. 121 (6 Am. Dec. 267); Hunt *v.* Wadleigh, 26 Me. 271 (45 Am. Dec. 108); Bassenhorst *v.* Wilby, 45 Ohio St. 333 (13 N. E. 75); McKinney *v.* Crawford, 8 Serg. & R. 351; Graul *v.* Strutzel, 53 Iowa, 712 (6 N. W. 119); Shelby *v.* Judd, 24 Kan. 161. In New York, it is held that no subsequent demand is necessary to hold a post-due indorser liable, if the bill or note has been transferred after maturity with the protest attached. St. John *v.* Roberts, 31 N. Y. 441 (88 Am. Dec. 287).

The strict enforcement of the requirement of presentment is by the general rule of law limited to drawers and indorsers. As a general proposition, therefore, it may be stated, that a party who is not a drawer or indorser, is not discharged from his liability, if the presentment has not been made on the day of maturity. Parties secondarily liable, who are not regular parties to the bill or note, may, nevertheless, be held. The subjects of irregular indorsements and of the rights and obligations of guarantors, are treated fully elsewhere.[1] Presentment on the day of maturity is not necessary where the paper is non-negotiable for any reason.[2]

§ 115. **By whom must presentment be made.**— Any *bona fide* holder, and anyone having lawful possession for the purpose of collection, may present the paper to the acceptor or maker for payment and receive payment. Payment to such a person will extinguish the liability of all parties to the paper to the lawful holder.[3] But, as will be explained more fully in a subsequent chapter,[4] for the purpose of making protest for non-payment, the presentment is required to be made by the notary or his duly authorized deputy.

The holder may, of course, make presentment for payment through an agent; and the agent's authority need not be in writing; although, probably, the acceptor or maker may require such written authority or an indorsement of the paper either to the agent or in blank, where it is made payable to order.[5] If the holder be dead, his personal representatives, whenever they are appointed, should make

[1] As to irregular indorsements see *ante*, § 92, and as to guarantors see *post*, § 157.

[2] Smith *v.* Cromer, 66 Miss. 157 (5 So. 619).

[3] Leftley *v.* Mills, 4 T. R. 175; Bachelor *v.* Priest, 12 Pick. 399; Agnew *v.* Bk. of Gettysburg, 2 Harr. & G. 478.

[4] See *post*, Chapter. XI.

[5] See Seaver *v.* Lincoln, 21 Pick. 267; Hartford Bank *v.* Stedman, 3 Conn. 489; Bank of Utica *v.* Smith, 18 Johns. 230; National Hudson River Bank *v.* Moffett, 17 App. Div. 232 (45 N. Y. S. 588); Cole *v.* Jessup, 10 N. Y. 96; Mt. Pleasant Bk. *v.* McLeran, 26 Iowa, 306.

the presentment.[1] If the paper is payable to a firm, and one of them dies, presentment should be made by the survivors.[2] If the holder is a married woman, in a State where the common law disabilities have not been removed by statute, presentment should be made by, and payment to, the husband.[3] And if the holder be a pledgee, he should make presentment for the benefit of himself and the pledgor.[4]

§ 116. **Possession as evidence of right to present for payment.** — Only one who has the right to receive payment, on his own account, or as the representative of another can make the presentment. Hence it is exceedingly important to determine how far possession may be considered as evidence of the holder's right to present for and to receive payment, so as to determine when the paper has been dishonored, or when the acceptor or maker can safely make payment.

If the paper is on its face payable to bearer, or it has been indorsed in blank, which makes it subsequently payable to bearer, the possession of the bill or note is held to be *prima facie* proof of ownership, and of the right of the holder to make presentment and to receive payment.[5]

But where the paper is payable to order, and there has been no indorsement in blank, possession is not *prima facie* evidence of ownership. The burden of proving ownership and consequent right to make presentment and to receive payment is on the holder, by proof of his acquisition of title without indorsement.[6] This can be done, where the indorsee is dead, by proof of the holder's appointment and qualification as executor or administrator. And where there

[1] White *v.* Stoddard, 11 Gray, 258 (71 Am. Dec. 711), and *ante*, § 49.

[2] See *ante*, § 41.

[3] See *ante*, § 36.

[4] Cowperthwaite *v.* Sheffield, 1 Sandf. 447; Jennison *v.* Parker, 7 Mich. 355.

[5] Bachellor *v.* Priest, 12 Pick. 399; Agnew *v.* Bank of Gettysburg, 2 Harr. & G. 478; Jackson *v.* Love, 82 N. C. 405 (33 Am. Rep. 685); Cone *v.* Brown, 15 Rich. 262.

[6] Pease *v.* Warren, 25 Mich. 9 (18 Am. Rep. 58).

has been an assignment or a sale under execution or attachment of the note or bill, by proof of such assignment, execution or attachment.

And so it is with the holder of an unindorsed bill or note, payable to order, who claims to be the agent of the last indorsee. Such professed agent must prove his authority. Possession by him of such a bill or note is not *prima facie* proof of his right to make presentment and to receive payment.[1] When an indorser's possession of a bill or note payable to order is *prima facie* proof of ownership, is not definitely determined by the cases. Some of them hold that his possession is presumptive evidence of his right to make presentment only when the subsequent indorsements have been canceled;[2] while others maintain that cancellation of the subsequent indorsements is not essential to the *prima facie* proof of his right to make presentment and to receive payment.[3]

It would seem more rational, and more in accordance with the fundamental principles of the law of commercial paper to require, in making out a *prima facie* case of ownership by an indorser, not only cancellation of the subsequent indorsements, but also proof that they had been canceled by the subsequent indorsees or with their consent.

§ 117. **To whom should presentment be made.**— It is clear that presentment for payment should be made to the acceptor of the bill and the maker of the note, for they are the primary debtors. And if the acceptor or maker can be found, the presentment must be made to him in

[1] Doubleday *v.* Kress, 50 N. Y. 410 (10 Am. Rep. 502); Dodge *v.* Nat. Exch. Bk., 30 Ohio St. 1.

[2] Bank of Utica *v.* Smith, 18 Johns. 230; Chautauqua Co. Bank *v.* Davis, 21 Wend. 584; Lawrence *v.* Russell, 77 Pa. St. 460; Brinkley *v.* Going, 1 Ill. 288; Kyle *v.* Thompson, 3 Ill. 432.

[3] Dugan *v.* U. S. Bank, 3 Wheat. 172; Bank of U. S. *v.* United States, 2 How. 711; Kerrick *v.* Stevens, 58 Mich. 297 (25 N. W. 199); Bank of Kansas City *v.* Mills, 24 Kan. 604; Best *v.* Nokomis Nat. Bk., 76 Ill. 608; Norris *v.* Badger, 6 Cow. 449; Page *v.* Lathrop, 20 Mo. 589.

person. But if he cannot be found in the place, where the law requires presentment to be made,[1] on the day of maturity, presentment and demand should be made of any one, who is of the years of discretion, and who is in charge of such place, whether it be the residence or place of business of such acceptor or maker.[2]

Where a corporation is the acceptor or maker, care should be taken to make presentment to the officer who is authorized to represent the corporation in such matters.[3]

If the acceptor or maker be dead, and his representatives have been duly appointed and qualified, presentment should be made to such representatives, if they can be found. But if there are no personal representatives at the time of maturity of the paper, presentment should be made at the place of residence or of business of the deceased obligor, to any person of years of discretion, who is in charge of such place; unless the paper is payable at a bank or some other specified place, when presentment there will be sufficient.[4]

If the acceptor or maker is a firm, presentment to one of the partners is sufficient, even though the partnership has been dissolved, whether by death, by agreement, or by limitation.[5] If there are two or more acceptors or makers,

[1] As to which see *post*, § 118.

[2] Merchants' Bank *v.* Spicer, 6 Wend. 443; Hunt *v.* Maybee, 7 N. Y. 266; Stinson *v.* Lee, 68 Miss. 113 (8 So. 272); Bradley *v.* Northern Bank, 60 Ala. 259; Draper *v.* Clemens, 4 Mo. 52; Kleekamp *v.* Meyer, 5 Mo. App. 444; Whaley *v.* Houston, 12 La. Ann. 585. And it seems to be a requisite that the certificate of protest shall name or describe the person to whom presentment was made, unless it is stated that no one could be found, to whom presentment could be made. Nave *v.* Richardson, 36 Mo. 130.

[3] Newark India Rubber Co. *v.* Bishop, 3 E. D. Smith, 48; McKee *v.* Boswell, 33 Mo. 567; Casco Bk. *v.* Mussey, 19 Me. 20.

[4] Magruder *v.* Union Bk., 3 Pet. 87; Bank of Washington *v.* Reynolds, 2 Cranch. C. C. 289; Hale *v.* Burr, 12 Mass. 86; Groth *v.* Gyger, 31 Pa. St. 271 (72 Am. Dec. 745); Weems *v.* Farmers' Bank, 15 Md. 231; Davis *v.* Francisco, 11 Mo. 572 (49 Am. Dec. 98); Frayzer *v.* Dameron, 6 Mo. App. 153.

[5] Shed *v.* Brett, 1 Pick. 401 (11 Am. Dec. 209); Hubbard *v.* Matthews, 54 N. Y. 43 (13 Am. Rep. 562); Greatlake *v.* Brown, 2 Cranch C. C. 541;

who are not partners, presentment should be made to all of them, at least where they all reside in the same place.[1] But where they reside in different places, the necessity for presentment to all of them varies according to circumstances.

It is certain that where the paper is payable in a particular place, it need be presented to the resident obligors only.[2] And where there is no express stipulation as to place of payment, it has been held that presentment need be made only to the obligors who reside in the most accessible place.[3] But it would seem that presentment should be made to all, notwithstanding their residence in different places, until payment has been received. And if they reside in places so far distant from each other, that presentment cannot be made on the same day, it must be made to the more distant one, as soon as possible after maturity.[4]

If a bill is accepted *supra protest*, presentment for payment should be made to the drawee and afterwards, in case of non-payment by the drawee, to the acceptor *supra protest*, and both presentments must be averred in the protest.[5]

§ 118. **The place of presentment.**— If a place of payment is not stated in a bill or note, it is a presumption of law that it is payable at the domicile of the acceptor or maker, or at the place where he conducts his business, if

Erwin *v.* Downs, 15 N. Y. 575; Fourth Nat. Bank *v.* Henschen, 52 Mo. 207; Mount Pleasant Bank *v.* McLeran, 26 Iowa, 306. If one of the partners dies, presentment should be made to one of the surviving partners, and not to the personal representatives of the deceased partner. Cayuga Co. Bk. *v.* Hunt, 2 Hill, 635.

[1] Arnold *v.* Dresser, 8 Allen, 435; Gates *v.* Beecher, 60 N. Y. 518 (19 Am. Rep. 207); Britt *v.* Lawson, 15 Hun, 123; Bank of Red Oak *v.* Orvis, 40 Iowa, 332; Benedict *v.* Schmiegs, 13 Wash. 476 (43 P. 374); Nave *v.* Richardson, 36 Mo. 130.

[2] Smith *v.* Little, 10 N. H. 526.

[3] Harris *v.* Clark, 10 Ohio, 6.

[4] See 1 Daniel's Negot. Inst., § 595; 1 Parsons N. & B. 363, note w. As to joint and several notes and bills see *ante*, §§ 10, 11.

[5] See *ante*, § 71.

he has any. And presentment should be made to him at such place. The place of the date of the instrument is *prima facie* the place of payment; and if it happens that the place of date is not the domicile or place of business of the acceptor or maker, so that he cannot be found in the place of date, the holder is not obliged to make inquiries after the obligor's abode or place of abode; and if he does not know where the obligor is to be found, the holder satisfies the requirements of the law, if he holds the paper at the place of date in readiness to receive payment. But if he knows where the acceptor or maker is to be found, the presentment must be made to the latter at his actual place of business or domicile.[1]

The parties may, however, agree upon a different place of payment, and presentment must then be made at the stipulated place and need not be presented anywhere else, whether such stipulation has been inserted in the body of the bill or note, or it constitutes a collateral agreement; and whether such collateral agreement is verbal or is reduced to writing. The only difference in effect is, that if the stipulation is collateral, it will be binding only on those subsequent indorsers or transferees of the bill or note, who know of the agreement.[2] Where the paper is made payable at either of two or more places, presentment may be made at either of them, and need be made at only one. This ruling has been made quite frequently where a bill or note is payable "at any bank" in a certain place.[3]

[1] Cox *v.* National Bank, 100 U. S. 704; Britton *v.* Nichols, 104 U. S. 757; Hazard *v.* Spencer, 17 R. I. 561 (23 A. 729; Smith *v.* Philbrick, 10 Gray, 252 (69 Am. Dec. 315); Farnsworth *v.* Mullen, 164 Mass. 112 (41 N. E. 131); Meyer *v.* Hibscher, 47 N. Y. 265; In re Parisian Cloak & Suit Co.'s Estate, 173 Pa. St. 507 (34 A. 224); Apperson *v.* Bynum, 5 Coldw. 341.

[2] Cox *v.* National Bank, 100 U. S. 704; Peabody Ins. Co. *v.* Wilson, 29 W. Va. 528 (2 S. E. 888); Meyer *v.* Hibscher, 47 N. Y. 265; Troy City Bank *v.* Lanman, 19 N. Y. 477; Appeal of Greenboum, 173 Pa. St. 507 (34 A. 224); Brown *v.* Jones, 113 Ind. 46 (13 N. E. 857).

[3] Jackson *v.* Packer, 13 Conn. 342; Way *v.* Butterworth, 106 Mass. 75; *s. c.* 108 Mass. 608; Malden Bk. *v.* Baldwin, 13 Gray, 154 (74 Am. Dec. 627); Boit *v.* Corr, 54 Ala. 112; Wilcox *v.* Williams, 5 Nev. 206. But

As long as the drawee has not accepted a bill, which is made payable in another place, a joint presentment for acceptance and payment may be made at either place, *i. e.*, at his place of business or domicile or at the place of payment. After acceptance, presentment for payment must, of course, be made at the place of payment.[1] If the bill has been accepted *supra protest*, the presentment to the drawee must be made at his domicile or place of business.[2]

After determining in what city or town presentment should be made, the further question remains to be answered, whether presentment should be made to the acceptor or maker at his residence or at his place of business. If the presentment is made to such obligor in person, and he does not object to the place of presentment, and gives that objection as his reason for refusal to honor his obligation, it will be a good presentment, it matters not where it was made. Presentment in the street would be sufficient under such circumstances.[3] But where the presentment is not made to the acceptor or maker in person, or he objects to the unusual place of presentment, the presentment is not good, unless it is made at his residence or place of business. If he has no place of business, or it cannot be found, presentment must be made at his residence in the place of payment.[4]

But where the acceptor or maker has a regular place of

the office of a private banker is not included in the stipulation for payment "at any bank." Way *v.* Butterworth, 108 Mass. 608; Nash *v.* Brown, 165 Mass. 384; 43 N. E. 180 (Trust company).

[1] Mason *v.* Franklin, 3 Johns. 202. And see Wolcott *v.* Van Santvoord, 17 Johns. 248 (8 Am. Dec. 396); Bank of U. S. *v.* Smith, 11 Wheat. 173.

[2] Mitchell *v.* Barney, 10 B. & C. 4.

[3] King *v.* Holmes, 11 Pa. St. 456; Parker *v.* Kellogg, 158 Mass. 90 (32 N. E. 1038); Gates *v.* Beecher, 60 N. Y. 518 (19 Am. Rep. 207); Frost *v.* Stokes, 55 N. Y. Super. 76; King *v.* Crowell, 51 Me. 244 (14 Am. Rep. 560).

[4] Packard *v.* Lyon, 5 Duer, 82; Bank of New Orleans *v.* Whittemore, 12 Gray, 469; Jarvis *v.* Garnett, 39 Mo. 271. And the same requirement is enforced, where he has abandoned his place of business. Talbot *v.* Nat. Bank, 129 Mass. 67 (37 Am. Rep. 302).

business, where he is in the habit of transacting his business in general, presentment must be made at that place, and not at his residence. And if he cannot be found there, or any one else, to whom presentment can be made in his absence, he need not be sought at his residence. The presentment at the place of business is sufficient to bind drawer and indorsers.[1] If the maker or acceptor has two regular places of business in the same city or town, and the address of one is given, presentment must be made at the given address, and presentment at the other place is not sufficient.[2]

Where a place of payment is designated in the bill or note; as for example, at a bank, presentment must be made there and need not be made anywhere else, although the bank was found to be closed, or no one could be found there who was authorized to receive payment. If, however, the bank has transferred its business to another bank or banker, and the holder knows of such transfer, and to whom, presentment should be made at the other bank or banker. But in no such case is it necessary to make presentment at the place of business or residence of the acceptor or maker.[3] If the holder does not know the place of business or residence of the acceptor or maker, and there is no stipulation of a place of payment, the holder must make diligent inquiry after the habitat of the acceptor or maker; and not until he has exhausted every reasonable means of securing the desired information of the whereabouts of

[1] Wiseman *v.* Chiapella, 23 How. 368; Shed *v.* Brett, 1 Pick. 401 (11 Am. Dec. 209); Berg *v.* Abbott, 83 Pa. St. 177 (24 Am. Rep. 158); Bank of Commonwealth *v.* Mudgett, 44 N. Y. 514; Bynum *v.* Apperson, 9 Heisk. 632; Hutchison *v.* Crutcher (Tenn. '97), 39 S. W. 725; John *v.* City Nat. Bank, 62 Ala. 529 (34 Am. Rep. 35). But presentment is not sufficient, when it is made at a place, where he is transacting some special business, and which is not his permanent and general place of business. Sussex Bank *v.* Baldwin, 2 Harr. 487.

[2] Brooks *v.* Higby, 11 Hun, 235.

[3] Central Bank *v.* Allen, 16 Me. 41; Douglass *v.* Bank of Commerce, 97 Tenn. 133; 36 S. W. 874; Guignon *v.* Union Tr. Co., 156 Ill. 135 (40 N. E. 556); Berg *v.* Abbott, 83 Pa. St. 177 (24 Am. Rep. 158); Waring *v.* Betts, 90 Va. 46 (17 S. E. 739).

such acceptor or maker, can be protest for non-payment, without making the required presentment.[1]

§ 119. **The time of presentment — Days of grace.**— In order to hold the drawer and indorsers liable on a bill or note, it is necessary to present for payment on the day of maturity. And presentment before or after the exact day of maturity will not be sufficient unless the holder has a sufficient excuse for delay.[2] But this statement is to be qualified by the allowance of the so-called *days of grace*. Instead of being payable on the day named in, or computed from the terms of the bill or note, independently of statute, it is really payable three (by local custom, sometimes, four) days after such time. This rule grew out of an old commercial custom of allowing drawees and acceptors this extra time for making arrangements for the payment of the bill. At first, this indulgence was a matter of grace, and not a matter of common right, as it finally became, and is now, wherever it has not been abolished by statute. Hence the name, *days of grace*. After the custom grew into a right, which could be demanded by the acceptor, it was extended to all kinds of commercial paper where the time of maturity was a certain date, or a specified time after date, sight or demand, but not to paper payable on demand.[3] Bills payable at sight

[1] Grafton Bank *v.* Cox, 13 Gray, 503; Taylor *v.* Snyder, 3 Den. 145 (45 Am. Dec. 457); Witkowski *v.* Maxwell, 69 Miss. 56 (10 So. 453); Gilchrist *v.* Donnell, 53 Mo. 591; Martin *v.* Grabinsky, 38 Mo. App. 359.

[2] Mechanics' Bk. *v.* Merchants' Bk., 6 Met. 13; Pendleton *v.* Knickerbocker L. Ins. Co., 5 Fed. 238; 7 Fed. 169; Windham Bk. *v.* Norton, 22 Conn. 213 (56 Am. Dec. 397); Walsh *v.* Dart, 12 Wis. 635; Griffin *v.* Goff, 12 Johns. 423; Georgia Nat. Bank *v.* Henderson, 46 Ga. 487 (12 Am. Rep. 590); McMurchey *v.* Robinson, 10 Ohio, 196.

[3] Bank of Washington *v.* Triplett, 1 Pet. 25; Messmore *v.* Morrison, 172 Pa. St. 300 (34 A. 45); Osborne *v.* Smith, 14 Conn. 366; Wooruff *v.* Merchants' Bank, 25 Wend. 673; Bower *v.* Newell, 8 N. Y. 190; *s. c.* 13 N. Y. 290 (64 Am. Dec. 550); First Nat. Bk. *v.* Price, 52 Iowa, 570 (3 N. W. 639); Guignon *v.* Union Tr. Co., 156 Ill. 135 (40 N. E. 556); Green *v.* Raymond, 9 Neb. 295 (2 N. W. 881); Carey-Lombard Co. *v.* First. Nat. Bk., 86 Tex. 299 (24 S. W. 260). See Commercial Bank *v.* Varnum, 49 N. Y. 269.

have been held to be both entitled[1] and not entitled[2] to days of grace. The custom of allowing days of grace has also been abolished by statute in many of the States.[3]

If the paper is payable in installments, days of grace will be allowed for the payment of each installment, unless the bill or note stipulates that the whole obligation matures on default as to one installment, when the one presentment and refusal to pay constitutes a dishonor of the whole bill or note.[4]

Days of grace are not allowed, where the instrument is for some reason nonnegotiable,[5] or where the paper contains, or the parties have agreed to, a waiver of the right.[6]

§ 120. **Computation of time — Legal holidays.** — In all computations of the time of payment of bills, notes and checks, the day of date is excluded, and the last day of the computation included. If the paper is payable in one or more years after date, the first or other subsequent anniversary of the date would be the day of payment, unless days of grace are allowed, when the day of maturity will be three days after such anniversary of the date. The same would be the rule, where the paper is payable one or more weeks or months after date. If the unit of time be a month, a calendar month is presumed to be intended, and the day of maturity will be the same day of the succeeding month, on which the bill or note is dated. For

[1] Cribbs *v.* Adams, 13 Gray, 597; Thornburgh *v.* Emmons, 23 W. Va. 325; Walsh *v.* Dart, 12 Wis. 635; Ward *v.* Sparks, 53 Ark. 519 (14 S. W. 898); Knott *v.* Venable, 42 Ala. 186.

[2] Trask *v.* Martin, 1 E. D. Smith, 505; Dalton City Bank *v.* Haddock, 54 Ga. 584; Lucas *v.* Ladew, 28 Mo. 342.

[3] It is abolished by the Negotiable Instruments Law recently enacted in New York and other States. See Appendix.

[4] Oridge *v.* Sherburne, 11 M. W. 374. But no days of grace are allowed in the payment of interest. Macloon *v.* Smith, 49 Wis. 200 (5 N. W. 336). But see *contra* Coffin *v.* Loring, 5 Allen, 153, where installment of principal matures at the same time with the interest.

[5] Avery *v.* Stewart, 2 Conn. 69 (7 Am. Dec. 240); Lamkin *v.* Nye, 43 Miss. 241.

[6] Perkins *v.* Franklin Bank, 21 Pick. 483.

example, if a note is dated the fifteenth of January, payable one, two or three months after date, it will be due (days of grace excluded), the fifteenth day of February, March and April, respectively. But if the date of the paper be the last day of the month, for example the 31st of January, and payable one, two, or three months after date, the day of maturity will be, respectively, the twenty-eighth of February (twenty-ninth, in leap year), thirty-first of March, and thirtieth of April.[1]

If the paper falls due on a Sunday or other legal holiday, presentment must be made on the day succeeding, if the days of grace are not allowed. But if the days of grace are allowed, then on the day preceding, namely the second day of grace. And if two holidays come together, on the first day of grace. But under no circumstances, except when otherwise provided by statute, can the acceptor of a bill or maker of a note be required to perform his obligation prior to the actual day of maturity, because of the concurrence of legal holidays at that time.[2] If the holiday does not fall on the last day, it is counted in the computation of time, as if it had been a business day.[3] The courts take judicial notice of the dates on which legal holidays fall.[4]

§ 121. **The hour of the day for presentment.**— Presentment for payment is required by the law to be made at a reasonable hour of the day. What is a reasonable hour

[1] Roehner *v.* Knickerbocker L. Ins. Co., 63 N. Y. 163; Ammidown *v.* Woodman, 31 Me. 580; Hartford Bank *v.* Barry, 17 Mass. 93; Daly *v.* Proetz, 20 Minn. 411; McMurchey *v.* Robinson, 10 Ohio, 496; McCoy *v* Farmer, 65 Mo. 244.

[2] Barlow *v.* Gregory, 31 Conn. 261; Staples *v.* Franklin Bk., 1 Met. 43 (35 Am. Dec. 345); Salter *v.* Burt, 20 Wend. 205 (32 Am. Dec. 530); Reed *v.* Wilson, 40 N. J. L. (12 Vroom) 29; Hirshfield *v.* Ft. Worth Nat. Bank, 83 Tex. 452 (18 S. W. 743); Barrett *v.* Allen, 10 Ohio, 426; Hitchcock *v.* Hogan, 99 Mich. 124 (57 N. W. 1095); Kuntz *v.* Tempel, 48 Mo. 75; Brennen *v.* Vogt, 97 Ala. 647 (11 So. 893); Capital Nat. Bank *v.* Am. Exch. Nat. Bk. (Neb. '97), 71 N. W. 743; overruling Bank *v.* McAllister, 33 Neb. 646 (50 N. W. 1040).

[3] Woolley *v.* Clements, 11 Ala. 220; Roberts *v.* Wold, 61 Minn. 291 (63 N. W. 739); Bartlett *v.* Leathers, 84 Me. 241 (24 A. 842).

[4] Reed *v.* Wilson, 40 N. J. L. (12 Vroom) 29.

depends upon the circumstances. If the bill or note is payable at a bank, presentment should be made during banking hours. If the paper is payable generally, and the acceptor or maker has a place of business, at which presentment should be made, business hours are the proper time for presentment; and if the obligor has no place of business, so that presentment must be made at his residence, any hour before the customary time for retirement will be considered reasonable. But in all these cases, the reasonableness of the hour of presentment is only important when the holder fails to find the acceptor or maker. If the presentment is actually made to him in person on the day of maturity, it matters not at what hour it is made.[1]

The acceptor or maker has the whole day in which to make payment. But a second demand cannot be required of the holder. If the paper is payable in a bank, it would seem to be necessary to keep the bill or note at the bank, so that the acceptor or maker may make payment there at any time during the business hours of the day. If it is payable at the place of business or residence of the obligor, he must seek the holder, in order to make payment, where he fails to pay, when the presentment was made.[2]

§ 122. **Mode of presentment.**— The person who makes the presentment must have possession of the bill or note, so that he may deliver it to the acceptor or maker, if he makes payment. And if the acceptor or maker demands it, the holder must exhibit the bill or note, so that the obligor may inspect it, if he wants to do so. The paper need not otherwise be exhibited; although it seems to be necessary, in making a presentment for payment, that the

[1] Farnsworth *v.* Allen, 4 Gray, 453; Bank of Syracuse *v.* Hollister, 17 N. Y. 46 (72 Am. Dec. 416); Salt Springs Nat. Bank *v.* Burton, 58 N. Y. 430 (17 Am. Rep. 265); Reed *v.* Wilson, 40 N. J. L. (12 Vroom) 29; First Nat. Bank *v.* Owens, 23 Iowa, 185; Skelton *v.* Dusten, 92 Ill. 49; Wallace *v.* Crilley, 46 Wis. 577 (1 N. W. 301); MacFarland *v.* Pico, 8 Cal. 626; Goodloe *v.* Godley, 13 Smed. & M. 233 (51 Am. Dec. 159).

[2] Harrison *v.* Crowder, 6 Smed. & M. 464 (14 Am. Dec. 290); 1 Parsons N. & B. 374.

demand of payment should be accompanied by some statement or indication that the paper is in the actual possession of the party who is making the presentment.[1] Where the paper is payable at a bank, it is sufficient if it is in the conscious possession of an officer of the bank, who is entitled to receive payment.[2]

It has also become established usage in many of the States for the bank which holds the paper, to give notice to the acceptor or maker a few days before the day of maturity, that his paper is at the bank and will be due on a certain day. Where the paper is payable at the bank, there can be no doubt, that this notice fully takes the place of a more formal presentment.[3] But it is not so clear, whether this preliminary notice takes the place of a presentment for payment on the day of maturity, when the paper is not payable at the bank, and is only deposited there for collection. This question has been answered in the affirmative[4] and in the negative.[5]

It is also required that the demand of payment should not vary from the tenor of the paper. It will not be a good presentment, if gold is demanded, where the paper does not call for payment in gold.[6]

[1] Musson *v.* Lake, 4 How. 262; Arnold *v.* Dresser, 8 Allen, 435; Legg *v.* Vinal, 165 Mass. 555 (43 N. E. 518); Lockwood *v.* Crawford, 18 Conn. 361; Ocean Nat. Bank *v.* Faut, 50 N. Y. 474; Waring *v.* Betts, 90 Va. 96 (17 S. E. 739); King *v.* Crowell, 51 Me. 244 (89 Am. Dec. 366); Draper *v.* Clemens, 4 Mo. 52; Smith *v.* Gibbs, 2 Smed. & M. 479.

[2] Chicopee Bk. *v.* Phila. Bk., 8 Wall. 641; Folger *v.* Chase, 18 Pick. 63; Nat. Hudson River Bank *v.* Moffett, 17 App. Div. 232 (45 N. Y. S. 588); Merchants' Bk. *v.* Elderkin, 25 N. Y. 178; Hallowell *v.* Curry, 41 Pa. St. 322; State Bk. *v.* Napier, 6 Humph. 270 (44 Am. Dec. 308); Huffaker *v.* Nat. Bk. of Monticello, 13 Bush, 644; People's Bk. *v.* Brooke, 31 Md. 7 (1 Am. Rep. 11); Lawrence *v.* Dobyns, 30 Mo. 196.

[3] Camden *v.* Doremus, 3 How. 515; Mills *v.* Bk. of U. S., 11 Wheat. 431; Lincoln &c. Bk. *v.* Page, 9 Mass. 155 (6 Am. Dec. 52); Dykman *v.* Northbridge, 36 N. Y. S. 962; 1 App. Div. 26.

[4] Jones *v.* Fales, 4 Mass. 245; Whitwell *v.* Johnson, 17 Mass. 449; Grand Bank *v.* Blanchard, 23 Pick. 505.

[5] Pearson *v.* Bk. of Metropolis, 1 Pet. 89; Barnes *v.* Vaughan, 6 R. I. 259; Farmers' Bank *v.* Duvall, 7 Gill J. & 78.

[6] Langerberger *v.* Kroeger, 48 Cal. 147.

ILLUSTRATIVE CASES.

Lazier *v.* Horan, 55 Iowa, 75 (7 N. W. 457).
Smith *v.* Cromer, 66 Miss. 157 (5 So. 619).
Guignon *v.* Union Trust Co , 156 Ill. 135 (40 N. E. 556).
Nash *v.* Brown, 165 Mass. 384 (43 N. E. 180).
Waring *v.* Betts, 90 Va. 96 (17 S. E. 739).

Deposit by Maker of Note, Payable at Bank, of Money at Such Bank to pay such Note Discharges Maker, if Bank Fails After Day of Maturity, and there has been no Presentment.

Lazier *v.* Horan, 55 Iowa, 75 (7 N. W. 457).

Action upon a promissory note, and for the foreclosure of a mortgage. There was a judgment and decree of foreclosure against the defendant, and he appeals. The facts appear in the opinion.

ROTHROCK, J. The promissory note, which is the foundation of the action, is in these words:—

"$1,250. DES MOINES, IOWA, March 21, 1872.

"On or before the twenty-first day of March, 1874, I promise to pay to William Braden or order $1,250, with interest thereon from this date until paid, at the rate of 10 per cent per annum, payable annually on the twenty-first day of March in each year, for value received, principal and interest payable at B. F. Allen's bank in the city of Des Moines. Should any of said interest not be paid when due, it shall bear interest at the rate of 10 per cent per annum from the time the same becomes due, and a failure to pay any of said interest within 30 days after due shall cause the whole of this note to thereupon become due and collectible at once.

his
"TIMOTHY × HORAN."
mark.

The mortgage securing this note is duly stamped with United States revenue stamp, legally canceled; indorsed on the back as follows, to wit: "Pay to the order of Jesse Lazier. WILLIAM BRADEN."

The note was given for part of the purchase money of certain real estate situated in Madison county. The land was owned by the plaintiff, and the sale was made through Braden, and the note was taken payable to the order of Braden, for the plaintiff's benefit.

On the twenty-first day of March, 1874, the defendant, who is a resident of Madison county, went to B. F. Allen's bank to pay the note. The note was not at the bank, and the defendant deposited the amount required to pay the same, to wit, $1,512.50,

and took from the bank a deposit ticket, of which the following is a copy:

"B. F. ALLEN'S BANK.

"*To Timothy Horan.* Des Moines, March 21, 1874. Currency to pay note favor William Braden for - - - $1,250 00
Interest - - - - - - - - - 262 50

Duplicate." $1,512 50

Some efforts were made by the defendant, by way of correspondence through Percival & Hatton, real estate agents at Des Moines, to have the note sent to the bank, but they were unavailing. The money thus deposited remained with the bank, and on the nineteenth day of January, 1875, the bank and B. F. Allen failed, and it does not appear from the evidence what, if anything, will be realized on account of said deposit. That it is a total loss does not seem to be seriously disputed.

We are required to determine whether the foregoing facts are a defense to an action on the note, or, in other words, where a note is made payable at a bank, and the maker deposits the amount necessary to fully discharge it, and leaves the same there, and the bank afterwards fails, is such deposit a complete defense to an action by the payee or indorsee against the maker?

It is well settled that as to the acceptor of a bill of exchange or the maker of a promissory note, payable at a bank or other specified place, no presentment nor demand of payment need be made at the specified place to entitle the holder to maintain an action against the maker or acceptor. Story on Promissory Notes, § 228; 1 Daniel on Negotiable Instruments, § 643; 1 Parsons on Notes and Bills, 308; Wallace *v.* McConnell, 13 Peters, 136; Fitler *v.* Beckley, 2 Watts & Serg. 458; Armstead *v.* Armstead, 10 Leigh, 525.

In Parsons on Notes and Bills it is said: "The courts in this country have, with the exception of Louisiana and Indiana, held that such acceptances were not conditional; that demand need not be averred by the plaintiff, but that if the acceptor was at the place at the time designated, and ready to pay the money, it was matter of defense to be pleaded on his part, which defense, however, is no bar to the action, but goes only in reduction of damages and in prevention of costs."

That the maker of a promissory note, and the acceptor of a bill of exchange payable at a particular place, are under the same obligation in this respect, and their rights and liabilities are the same, seems also to be well established. See the authorities above cited. What are the rights of the parties, however, where the maker of a note or the acceptor of a bill deposits the money in the bank designated as the place of payment, and leaves it there, is another question, upon which there is a surprising paucity of adjudicated cases. The learned counsel for the respective parties in this cause have cited us to no case which is exactly in point.

It is true that in Wallace *v.* McConnell, supra, there is language used from which it may fairly be implied that in such case, if the holder of the note or bill should neglect to present it at the specified place, by reason of which the money should be lost by the failure of the bank or the like, this would be a defense; and in Armstead *v.* Armstead, supra, it is said "that the maker, if he was ready at the time and place to make the payment, may plead the matter in bar of damages and costs; but he must at the same time bring the money into court which the plaintiff will be entitled to receive. A further consequence, indeed, might follow if any loss had been sustained by his failure to present, but this must be set up as matter of defense. In Fitler *v.* Beckley, supra, Houston, J., said: "I incline to the opinion in 13 Peters, 144, as above, that if the maker or acceptor, where the money is payable at a bank, pays the money into the bank, to the credit of the payee on such note or bill, and leaves it there, it will be a complete discharge, though the money should be lost by robbery of the bank or otherwise; but this case does not call for an opinion of the court on this point."

In Nichols *v.* Pool, 2 Jones (L.) N. C., in discussing the question whether a demand at the place of payment is necessary to maintain the action, it is said: "The more reasonable construction that they (the words 'payable,' etc.) were used to convey the idea that the parties had made an arrangement, suggested by considerations of convenience to both sides, according to which the money is to be paid at a particular place, on a given day; or, in other words, assurance given by the debtor, and accepted by the creditor, that the money will be then and there paid. * * * Considered in this sense the effect is that the creditor does not lose his debt by failing to apply for it at the precise time and place, but may afterwards recover it; while, on the other hand, the debtor may, if, in fact, he had the money at the time and place, use that as a defense and defeat the action by bringing the money into court, or, if he deposited it, and it was lost by the failure of the bank, he can put the loss on the creditor, because of his laches in not cal ing to get it."

In Rhoades *v.* Gent, 5 B. & A. 244, language to the same effect is used in the opinion of one of the judges. An examination of these cases will show that the question of the rights of the parties where there has been actual deposit made by the maker or acceptor, is not directly involved. They are all cases upon the question as to whether an action may be maintained without a demand having been made at the place of payment. The language which we have quoted is, however, germane to the question which was before the courts in the several cases involving the rights of the parties to written instruments of this character, and, if nothing more, serves to indicate the views of the learned writers of the opinions cited.

In Story on Promissory Notes, § 228, this language is used: "If, by such omission or neglect of presentment and demand,

he (the maker or acceptor) has sustained any loss or injury, as if the bill or note were payable at a bank, and the acceptor or maker had funds there at the time, which have been lost by the failure of the bank, then and in such case the acceptor or maker will be exonerated from liability to the extent of the loss or injury so sustained." To the same effect see Story on Bills of Exchange, § 356; 1 Parsons on Contracts, 272–3; Daniell on Negotiable Instruments, § 643.

It is correct as claimed by counsel for appellee that these writers cite no authority which supports the proposition announced by them. But, notwithstanding this, the views of these learned authors are entitled to proper consideration. On the other hand, no case has been cited which announces the opposite view from that given in the above citations. With the limited time at our disposal, we are unable to make an exhaustive search for authorities and in this case we have found none which are fairly in point. In Rowland *v.* Levy, 14 La. Ann. 223, it was held, when a note was payable at the office of a commercial firm in New Orleans, and at maturity it was presented by the holder at the place named for payment, and payment refused, and a few days after maturity the maker remitted part of the sum to the mercantile firm to be applied on the note, that this was no payment. It will be observed from this statement that the case is wholly different from that at bar. Here, if the note had been presented at maturity. It would have been paid, for the money was in the bank for that very purpose. It would, perhaps, be an unreasonable requirement to hold that the holder of the note or bill should present it again for payment.

We think that, upon principle, the defendant in this case should be wholly discharged, and we will briefly state our reasons therefor. The note was made payable at a bank. These institutions are depositories of money. They are also collection agencies, through which by much the larger part of that branch of the business of the country is transacted. When a note is made payable at a bank the parties expect the collection to be made through the bank. It is true, when the defendant deposited the money the bank, while holding it, was technically the agent of the depositor. But the money was deposited for the holder of the note, and it required no act of the depositor to authorize the bank to pay the note. "If the customer of a banker accept a bill and make it payable at his banker's, that is of itself a sufficient authority to the banker to apply the customer's funds in paying the bill." Byles on Bills, 151. And if money be deposited for the payment of such a bill or note the holder may maintain an action against the bank therefor. Parsons on Common Law, 130. By the very terms of the contract the defendant agreed to pay the note at the bank. Now, while it is a general rule that payment of a note or bill should be made to the actual holder, yet when the parties have contracted that payment may be made at a bank it means that payment is to be made at the bank. The

parties to this note did not contemplate that the payee should make a journey from Indianapolis and meet the maker at Allen's bank, and there receive his money from the hands of the maker and deliver him the note.

This court has three times determined that when the maker of a promissory note, payable in personal property, to be delivered at a specified time and place, makes a tender of the specific articles and sets them apart at the time and place stipulated, and the creditor is not there to receive, or refuses to accept, the property, the debt is thereby discharged and the title to the property passes to the creditor. Gaines *v.* Manney, 2 Green, 251; Williams *v* Triplett, 3 Iowa, 518; State *v.* Shripe, 16 Iowa, 36. Now, while it is held in these cases, that upon designating the property and setting it apart for the creditor the title of the property passes, and, it may be said, that by the deposit of the money in the bank for the holder the right of property in the money does not pass, because the depositor may withdraw it, yet this distinction is really not an important one, for, as we have seen, if the money remains on deposit, the holder of the note may present his note and take the money, or, if necessary, maintain an action for it. In one of the cases cited the note provided for payment in brick. Now, if that could be discharged by delivering the brick set apart for the creditor at the time and place designated, it is difficult to see why, if the note was payable in dollars, it would not equally be a discharge to set apart and deposit the dollars for the holder of the note.

In our opinion there should have been a judgment for the defendant for costs, and the mortgage should have been canceled, as prayed in the answer. Reversed.

Non-negotiable Instrument — Presentment for Payment Unnecessary.

Smith *v.* Cromer, 66 Miss. 157 (5 So. 619).

Appeal from circuit court, Jackson county; S. H. Terral, Judge.

This is a proceeding by attachment. The affidavit alleged an indebtedness by Louis Cromer, but the declaration was against Louis Cromer and several other named persons, "doing business under the firm name of Louis Cromer."

The following is the instrument sued on:—

"$365.74. MOSS POINT, April 16, 1888.

"Received on board schooner Robert Delmas, from E. B. Smith, 2,244 barrels of charcoal, for which I promise to pay to the order of John J. Driscoll, at New Orleans, the sum of $365.74.

"LOUIS CROMER, Master."

The schooner, with the charcoal on board, ran on a bar and sunk, and, the defendant having first promised to turn over the

schooner and cargo in settlement of the indebtedness, and afterwards having refused to do that, or to make any other satisfactory agreement about paying the indebtedness, this attachment was sued out and levied on the schooner and cargo. The defendant Louis Cromer pleaded that the debt was not due when the attachment was sued out, and the other defendants pleaded that they did not make the writing, and that they were not partners with Louis Cromer, and did not promise, etc. On the trial the court refused to admit evidence that the defendants other than Louis Cromer were liable for the debt, for the reason that the attachment had only been sued out against him; and the court instructed the jury to find for the defendant, because the "bill of exchange for the debt sued on was given payable to John J. Driscoll, at New Orleans, La., and no demand was ever made for the payment of the bill of exchange by any person entitled or authorized to make such demand." Judgment was rendered against Smith, and he appeals.

Campbell, J. The plaintiff should have been allowed to show by evidence the liability of the defendants other than Louis Cromer. They had pleaded, and their liability was the question at issue as between them and the plaintiff. The action of the court on the instructions was erroneous. The instrument sued on is not a bill of exchange. It was not necessary for it to be presented in New Orleans for payment. The plaintiff certainly showed himself entitled to a verdict against Louis Cromer, and proposed to show the liability of the other defendants, who had pleaded to his declaration, and denied liability, and the court denied him the right to show this. If any objection could have been made by the defendants who were not embraced by name in the attachment, they waived it by pleading to the action.

Reversed and remanded.

Time of Presentment — Acceleration of Time of Maturity — Foreclosure of Mortgagee, given to secure Notes — What Law Controls Construction of Notes.

Guignon *v.* Union Trust Co., 156 Ill. 135 (40 N. E. 556).

Appeal from appellate court, Fourth district.

Bill by the Union Trust Company and and others against Emile S. Guignon and others to foreclose a mortgage. Complainants obtained a decree, which was modified by the appellate court. 53 Ill. App. 581. Defendants appeal. Affirmed.

This was a bill in equity brought in the circuit court of St. Clair county, to foreclose a mortgage. Upon a hearing in the circuit court, on the answer, replication, and the evidence, a decree was rendered in favor of the complainants in the bill, which, on appeal, was affirmed in the appellate court.

The opinion of the appellate court is as follows: —

"This was a suit brought by the Union Trust Company, trustee,

William H. Alley, John B. Logan, Charles A. Mair, and the executors of the last will of Josephus Collett, deceased, against Emile S. Guignon, of St. Louis, Mo., and others to foreclose a mortgage executed by Guignon to secure the purchase money of the lands in said mortgage described, amounting to $60,000, evidenced by his six principal promissory notes for $6,666.66⅔ each, and notes for the interest thereon, in favor of said Collett, and three principal notes for the same sum each, and notes for the interest thereon in favor of Emily C. Lyon. Three of said nine principal notes matured March 18, 1892; three March 18, 1893; and the remaining three, March 18, 1894. The principal and interest notes maturing March 18, 1892, and the interest notes maturing September 18, 1892, were paid at maturity. Five of the unpaid Collett notes were undisposed of when he died, and were held by his executors; and the remaining unpaid five notes he sold to complainant Alley, two of which, maturing March 18, 1893, were protested by Scudder, notary. Emily C. Lyon sold the five unpaid notes payable to her to complainant Mair, before maturity. The principal note, due March 18, 1893, and the note for interest thereon, due on same date, for $400, were protested by Carr, notary; and complainant Lyon, after the protest, bought them of Mair, because Lyon had guaranteed their payment. The remaining three of said unpaid notes are held and owned by Mair. Damages of 4 per cent on the amount of the protested notes were asked for in the bill, by virtue of the provisions of the Missouri statute set out at length therein. The mortgage provides that compensation shall be made to the trustee for all services rendered, and also that the mortgagor agreed to pay all expenses, fees, and charges of the said trust company in executing the trust. The bill also prays for an accounting and payment of the amount which, under the bill and mortgage (made part thereof), may be found due upon an account stated. The cause was heard by the court upon the bill, answer, and evidence, all the defendants except August Gehner appearing; and as to him the court found it had jurisdiction, and he, having failed to answer, the bill was taken as confessed by him. The court found all the material allegations of the bill were true, setting out the findings specifically, and also that the Union Trust Company, complainant, was entitled to $2,650 as a reasonable compensation for its services and the necessary expenses incurred by it in and about the execution of the trust and referred the cause to the master to compute the amount due each of the complainants, in view of the findings and the several notes which are part of the record; and the decree then further recites that on the 21st of December the master presented his report, finding $6.986.83 due complainant Mair, $7,720.33⅓ due complainant Lyon, $14,707.16 due complainant Alley, and $14,424.50 to complainant executors Jump and Bogart, and approves said report, and thereupon decrees that defendant Emile S. Guignon, within 35 days from date of decree, pay each of said parties the sum so due to each respectively, with 5 per cent

interest from date of decree upon all except said sum of $2,650, which shall be taxed and included as costs. Decree then provides for sale of mortgaged premises in case of default, subject to redemption.

"Defendants appealed, and bring up the record to this court. The following errors are assigned: (1) The decree is against the law and the evidence. (2) The decree is for too large an amount. (3) The court erred in allowing 4 per cent damages, under the laws of Missouri, to Alley and Lyon. (4) The court erred in allowing $400 to the Union Trust Company for services, there being no evidence to support such allowance, nor prayer in the bill. (5) The court erred in allowing the Union Trust Company $2,250 for solicitor's fees. The amount is excessive, and there is no provision in the mortgage nor prayer in the bill to that effect. (6) The court erred in allowing the Union Trust Company $2,650 for services and expenses incurred in the execution of the trust, as a part of the decree and costs. And, for other errors apparent in the record, appellants pray for a reversal, etc.

"Under these assignments, it is first objected that the master improperly allowed interest, in his computation, upon the three principal notes for $6,666.66⅔ each, maturing March 18, 1894, from September 18, 1893, to December 18, 1893, the date of decree. These three notes, by their terms, were not due until March 18, 1894, but because of the default in not paying the notes due March 18, 1893, became due, together with accrued interest, by the terms of the mortgage, if the holders elected to declare them due, which they did. The interest notes last matured for the interest of these three principal notes became due March 18, 1893, and were allowed in the computation; but the accruing interest on the principal from that date up to the date of the decree was also equitably due the holders of said notes, and was properly included in the computation made by the master. It is true, interest notes maturing March 18, 1894, were given, which would include and cover interest accruing for the period mentioned; but these notes were not figured in said computation, although offered in evidence, and each contained this clause: 'This is an interest note, subject to reduction or total defeasance, depending on payment on principal notes.' With such notice on the face of each, it is quite improbable they could be sold to a purchaser for value, and if negotiated, there being nothing due thereon above the accruing interest so computed and allowed, no recovery could be had.

"It is also objected that the court erroneously allowed 4 per cent damages to complainants Alley and Lyon on protested notes claimed in the bill to be due by virtue of the statute of Missouri. The mortgage notes held by Alley so protested were payable to Josephus Collett, one for $6,666 66⅔, the other for $400, both due March 18, 1893, protested March 21, 1893, by William H. Scudder, Jr., protest signed 'Wm. H. Scudder,' sworn to by 'Wm. H. Scudder, Jr.;' and it is insisted that the variance in

the name of the notary is fatal, and that Wm. H. Scudder, Jr., named in the body, and who swears to it, may be a different person from the Wm. H. Scudder who signs it. In our judgment, the omission of the addition 'Jr.,' in the one instance, does not justify the inference that two different persons officiated in the protest, — one making it, and swearing to the fact; the other signing the certificate. Wm. H. Scudder and Wm. H. Scudder, Jr., were evidently one and the same person, and the court properly so held.

"It is next insisted that the protests are insufficient to entitle the complainant owners of the protested paper to recover the 4 per cent damages allowed by the Missouri statute, for the reason no demand was made on Guignon, nor was any notice given him of the dishonor of the paper. The payment was demanded at the office of the Union Trust Company in St. Louis, which was the place the notes were, by the terms thereof, to be paid. Other demand upon the maker was not required; nor was he entitled to notice of dishonor. He was a primary debtor, not an indorser. 2 Daniels Neg. Inst. (1st ed.), p. 47, § 995; Donnell *v.* Bank, 80 Mo. 172.

"It is next insisted that the notes and mortgage are Illinois contracts, are and not within the operation of the Missouri statute, allowing damages of 4 per cent upon the principal sum of a note duly presented for payment and protested for nonpayment. The mortgage recites that Emile S. Guignon, the mortgagor, of St. Louis, Mo., mortgages and warrants to the Union Trust Company, of St. Louis, Mo., trustee, the land described in the bill. All the notes were dated, executed, and made payable at the office of said trust company in St. Louis. Hence the place fixed for the performance of the contracts was St. Louis, and the notes are to be held Missouri contracts, and subject to the provisions of said statute. Land Co. *v.* Rhodes, 54 Mo. App. 129.

"It is further contended that the notes protested were indorsed by the payee in blank, and held by other parties at time of protest, not complainants in the bill, and who were then prima facie owners thereof, and therefore they, and not complainants Lyon and Alley, were alone entitled to the 4 per cent damages. The evidence of Lyon and Alley establishes the fact of their ownership of all of said notes as alleged in the bill, and they, as such, had the right to recover the damages allowed them, respectively, for nonpayment and protest. The indorsement in blank was not intended to and did not vest the title of said protested notes, or either of them, in the Union Trust Company or State Bank of St. Louis.

"It is also insisted that the protests of the two Lyon notes, protested by Carr, are void, because the certificates of protest are not verified by his affidavit. The record shows they were so verified, and counsel for appellant are also mistaken in their statement that it is not alleged in the bill that the notes were presented at the place where they were to be paid.

"It is further objected that as the notes were due March 18th, and the demand was made for payment on March 21st, and protested on same day, and three days' grace being allowed by the law, the protest was premature. In each certificate of protest it is recited that the notary presented the note during the business hours, at the office of the Union Trust Company, St. Louis, Mo. (the place of payment), on March 21, 1893, and demanded payment, which the maker refused. In Cook *v.* Renick, 19 Ill. 598, it was held that, in the absence of statutory provision to the contrary, a bill presented for payment on the last day of grace was presented in proper time. In the case of Bank *v.* Barksdale, 36 Mo. 573, it is said: 'It seems to be clearly established by the general current of authority that the protest must be made on the same day the presentment and demand was made. We think, under the proof, the demand was made at the proper time, and the protest on the same day was not premature.'

"The allowance of $2,250 solicitor's fees, and $400 for services of trustee, to be taxed as costs, is assigned for error. It is provided in the mortgage that compensation shall be made to the trustee for all services rendered and that the mortgagor agrees to pay all expenses, fees, and charges of the said trust company in executing this trust; and it is so alleged in the bill, and it is prayed that an accounting be made, and for payment of whatever may be found due complainants under the allegations of the bill. In the absences of these clauses of the mortgage, the trustee would be entitled to its reasonable expenses incurred in the execution of the trust, and all such expenses are a lien upon the mortgaged premises. Perry Trusts, § 910. But, with the provisions mentioned contained in the mortgage, there can be no doubt that the necessary and reasonable solicitor's fees and reasonable compensation to the trustee for services were intended to be provided for, and made a lien upon the land. The purpose was to secure to the mortgagees the payment in full of the principal and interest due them, exempt from any expense for collecting the same by law or in payment of the trustee's expenses and services in the execution of the trust. To collect the mortgage debt, this proceeding in chancery became necessary, and the services of solicitors were required. Evidence was heard by the court showing that the amount allowed for such services and for compensation of the trustee was reasonable, and we do not feel justified in holding that it was excessive, or unreasonable.

"It was error to compute damages on the interest due at the date of the decree, and order that they be paid; but appellees have entered a remittitur for the amount thereof, and cured the error. The decree is therefore modified by deducting from the amount alllowed by the court below the amount of the remittitur, and decreeing that the balance be paid; and, as so modified, the decree is affirmed. Affirmed."

Craig, J. We concur in the judgment of the appellate court, and it will only be necessary to add a few words in addition to

what is said by that court. It is insisted in the argument that the appellate court erred in affirming that part of the decree wherein 4 per cent damages were allowed on the protest of a note as provided for by the statute of Missouri, as construed by the supreme court of that State in Clark *v.* Schneider, 17 Mo. 296, and other cases. In support of this position, reliance is placed on section 8, c. 74, p. 878, Hurd's Rev. St.: "When any written contract wherever payable shall be made in this State, or between citizens or corporations of this State, or a citizen or corporation of this State and a citizen or corporation of any other State, territory, or country (or shall be secured by mortgage or trust deed on lands in this State), such contract may bear any rate of interest allowed by law to be taken or contracted for by persons or corporations in this State, or which is or may be allowed by law on any contract for money due or owing in this State. * * *" We do not think this section of the statute controls the question involved. Here the contract was made in Missouri, and was payable in that State, and the right to recover the damages on the protest of the note depends upon whether the notes are to be construed according to the laws of Illinois or the laws of Missouri. If the latter, then the damages were properly allowed. In Jones on Mortgages (ed. 1894, vol. 1, § 657) the author says: "The validity of a contract secured by a mortgage made in one State upon lands in another State depends, so far as the usury laws affect it, upon the question, by the law of which State is the contract itself governed? If the loan is to be repaid in the State where it is made, the contract will be governed by the laws of that State, even when secured by mortgage of land situate in another State." Section 660: "The authorities generally do not regard the circumstance that the loan is secured by mortgage in determining whether it is usurious." Section 662: "But, as to the form and validity of the mortgage deed as a conveyance, the law of the place where the land is situated must always govern." In 1 Daniel Neg. Inst. (ed. 1891), p. 930, the author (section 918) says: "The rate of interest which a bill of exchange or promissory note bears when no rate is specified, and the question whether or not it shall bear interest are both determinable by the law of the place where it is expressly or impliedly to be paid." Section 921: "The rule applicable to interest applies as well to what is distinctly termed 'damages.' Each party, drawer, indorser, and acceptor, is liable according to the place where the bill is drawn, indorsed, or accepted." Sections 1, 2, c. 98, Hurd's Rev. St., entitled "Negotiable Instruments," provide for the payment of damages on bills of exchange protested for non-payment in certain specified cases. This statute would seem to indicate that the allowance of damages to the holder of protested commercial paper was not contrary to the policy of the State. Under the authorities, we are of opinion that the laws of Missouri, where the paper was payable, must control.

Testimony was introduced before the master showing what the services of the solicitor were reasonably worth in the case, and from the evidence the master reported as follows: "The master further reports from the evidence that a reasonable sum for expenses for attorneys for the trustees is $2,250." The evidence before the master also showed that the services of the Union Trust Company were reasonably worth $400. The report of the master was approved, and the court in its decree found "that the Union Trust Company is entitled to $2,650, as a reasonable compensation for its services and the necessary expenses incurred by it in and about the execution of the said trust. Cause referred to master for computation." Upon this finding, the court, among other things, decreed "that, out of the proceeds of the sale, the master in chancery pay, first, the costs of this suit and of said sale, including $2,650 to said Union Trust Company." As has been seen, the decree was affirmed in the appellate court; and it is insisted that the decision affirming the allowance of $2,650 to the Union Trust Company is erroneous. It will be observed that the allowance of $2,650 embraced two items: First, $400, for the services of the Union Trust Company; second, $2,250 to cover reasonable solicitor's fees for foreclosing the mortgage. We will consider the two items separately.

As respects the first, the deed of trust contains this provision: "It is agreed that the said trustee, under this indenture, shall be entitled to a reasonable compensation for all services rendered thereunder, to be paid by the said mortgagor." Here is an express agreement by the mortgagor to pay the trustee compensation for his services, and the evidence shows that the compensation was worth $400 (the amount allowed by the court); and we see no reason why, under the agreement and evidence, the allowance should be disturbed. Appellants' attorneys have cited and rely on Heffron *v.* Gage, 149 Ill. 186; 36 N. E. 569, as an authority sustaining their position. An examination of the decision in that case will show that it has no bearing on the question. In that case the circuit court allowed a trustee's fee, and also solicitor's fees; but, on appeal to the appellate court, the decree was set aside as to the trustee's fees, and affirmed in all other respects. The defendants appealed to this court, and we affirmed the judgment of the appellate court; but the trustee, who was defeated in the appellate court, assigned no cross errors, and the ruling of the appellate court as to his fees was not called in question, and nothing was decided or said on that subject.

We now come to the question as the amount allowed the Union Trust Company for solicitor's fees. The mortgage contains a provision for releasing portions of the mortgage property upon certain payments being made, and then follows this clause: "The mortgagor agrees to pay all expenses of such releases, as well as all other fees and charges of the said trust company in executing this trust." Here the Union Trust Company, the trustee named in the mortgage, was called upon by the holders of the mortgage

indebtedness to foreclose the mortgage. In order to do this, it was necessary for it to employ solicitors,— men skilled in that department of the law. The company was not a lawyer, and could not, without the assistance of a solicitor, forclose the mortgage; and whatever expense the company incurred in foreclosing the mortgage which was reasonable in amount would, in our opinion, fall within the clause of the mortgage supra, providing for fees and charges.

Objection is made to the amount allowed. The amount of the mortgage foreclosed was over $43,000. The mortgaged lands had been sold by the mortgagor, and, in foreclosing, care and skill were required in order to secure a good title under the decree in case no redemption was made. Under all the circumstances, we are not inclined to hold that the amount allowed was too large.

The judgment of the appellate court will be affirmed. Affirmed.

Note "Payable at any Bank," Cannot be Presented at a Loan and Trust Company to Hold Indorser.

Nash *v.* Brown, 165 Mass. 384 (43 N. E. 180).

Exceptions from superior court, Suffolk county; Albert Mason, judge.

Action by Willard G. Nash against Charles H. Brown, indorser on a promissory note held by plaintiff, "payable at any bank in Boston." The note was presented to the Massachusetts Loan & Trust Company, and duly protested. This corporation was created for the purpose of receiving, on deposit, storage, or otherwise, moneys, government securities, stocks, bonds, coin, jewelry, plate, valuable papers, and documents, evidences of debt, and other property of every kind, and of collecting and disbursing the principal of such property as produces interest or income when it becomes due, upon terms prescribed by the corporation, and for the purpose of advancing money or credits on real and personal security, on terms that might be agreed upon. The court, at defendant's request, ruled that the trust company was not a bank, within the contemplation of the contract set forth in the note, and that defendant could not be held, to which rulings plaintiff excepts. Exceptions overruled.

Field, C. J. This is an action against an indorser on a promissory note made "payable at any bank in Boston." The note was duly presented for payment at the office of the Massachusetts Loan & Trust Company, in Boston, and was duly protested by a notary public for non-payment. The question is whether the Massachusetts Loan & Trust Company is a "bank," as that word is used in the promissory note. The meaning of the word "bank" has been considered in Way *v.* Butterworth, 106 Mass. 75; 108 Mass. 509. The Massachusetts Loan & Trust Company is a corporation, but it is not a national bank, and not a State bank, within the meaning of Pub. St. c. 118. It was incorporated

by St. 1870, c. 323, under the name of the Northampton Loan & Trust Company, and by St. 1875, c. 16, was allowed to change its name to that of the Massachusetts Loan & Trust Company, and to have its location in Boston. See St. 1881, c. 95; St. 1888, c. 413. We assume that it has the power to discount commercial paper, and perform many other acts which banks of issue and deposit usually perform. But our statutes make a distinction between trust companies organized under our laws, and banks, and we are not aware that such trust companies are commonly called "banks," or that there is any well established custom to present promissory notes and bills of exchange payable at a bank to such trust companies for payment. The present case discloses no evidence of any such custom. We are of opinion that the ruling was right. Exceptions overruled.

Presentment for Payment at Maker's Place of Business — What is a Reasonable Hour — Note Payable at Bank which has Gone Out of Business.

Waring *v.* Betts, 90 Va. 96 (17 S. E. 739).

Lacy, J. This is a writ of error to a judgment of the corporation court of Danville, rendered on the 6th day of October, 1892. The action was debt on a negotiable note for $500 against J. L. Waring, W. L. Waring, Jr , and J. D. Blair, maker and indorsers of the said note, by E. Betts, the owner of the same. The note was negotiable, and payable at the Business Men's Bank of Richmond, Va., a going concern at the date of the execution of the note, but it went out of existence, ceased to do business, and distributed its assets before the maturity of the note. At the time of the maturity of the note it was not paid, and the action was instituted against maker and indorsers of the same as stated. The defense was by demurrer, and by plea of nil debit, and the defense is by the indorsers that the note was not presented for payment, nor duly protested, and that they are not bound. The case was tried by a jury, and a special verdict rendered, which is as follows: —

"We, the jury sworn to speak the truth upon the issue joined, upon our oath say that the defendant J. L. Waring executed a note in writing in words and figures, to wit: 'Danville, Va., April 26th, 1892, $500.00. Four months after date I promise to pay to the order of myself, with interest until paid, five hundred dollars, for value received. Negotiable and payable, without offset, at the Business Men's Bank of Richmond, Va.; and we, the makers and indorsers of this note, hereby severally waive the benefit of our homestead exemption as to this debt. J. L. Waring. No. due 26–29 Aug.' Indorsers on note: J. L. Waring, Jr., J. D. Blair. And other defendants indorsed said note. That said note was held by W. S. Patton, Sons & Company, bankers, in Danville, on the 29th of August, 1892, in their possession, in Danville.

That said W. S. Patton, Sons & Company sent the following telegram: 'Telegram of W. S. Patton, Sons & Company to Notary. Dated, Danville, Va., 29th, 1892. To J. F. Glenn, Cash. Merchants' National Bank, Richmond, Va.: We have failed to forward for collection note of J. L. Waring to his order, indorsed by him, W. L. Waring, Jr., and J. D. Blair, dated 26th of April, 1892, payable four months, at Business Men's Bank, Richmond, Va., for five hundred dollars. Will send it to you by messenger to-day. In mean time demand payment of it in bank hours, and, if not paid, have it protested to-day. Protect us. W. S. Patton, Sons & Company,'— which was received by John F. Glenn, cashier of Merchant's National Bank, Richmond, Va. (one of the witnesses), of Richmond, between one and two p. m. on 29th August, 1892. That said John F. Glenn, as a notary public for the city of Richmond, made a demand on W. L. Waring, Jr., one of the defendants, showing him said writing describing said note, at room 5, Hanewinckle Building, at 2:30 p. m., on the 29th of August, 1892, for the payment of said note, and he declined to pay it, and said W. L. Waring, Jr., said that he was not authorized to represent said Business Men's Bank. That the funds of the bank had all been distributed. That there were no assets of the bank in his hands. That the only place of business the said Business Men's Bank had on the 29th August, 1892, was at No. 5, Hanewinckle Building, Richmond, Va. That W. L. Waring, Jr., was the principal manager of said Business Men's Bank affairs on the 29th August, 1892. That previous to the 29th August, 1892, the Business Men's Protective Union, under whose charter the Business Men's Bank was doing business, had determined to cease to do banking business, and had distributed its assets. That at a subsequent hour on the 29th August, 1892, at 2:30 P. M., said John F. Glenn went to the said office of W. L. Waring, Jr., No. 6, Hanewinckle Building, with the said note in his possession, which had been brought to him by W. F. Patton, one of the firm of W. S. Patton, Sons & Company, after 5 P. M. on August 29, 1892, to demand payment of said note, and, not finding said W. L. Waring, Jr., in at that time, went immediately to the home of said W. L. Waring, Jr., to demand payment, but did not find him at his residence; whereupon said John F. Glenn, as notary public, protested said note, and gave legal notice of said protest, as set out in the following protest: 'Virginia, City of Richmond, to wit: Know all men by these presents that I, John F. Glenn, a notary public in and for the city aforesaid, duly commissioned and qualified, at the request of the cashier of the Merchants' National Bank of Richmond, on the 29th of August, in the year of our Lord 1892, presented the note, a copy of which is the reverse of this, written at the place of business, and also at the residence of W. L. Waring, Jr., former vice-president of the Business Men's Bank, at which bank said note is payable, the said Business Men's Bank being no longer in existence, and not having an office or other place of

business, and demanded payment of the same, the period limited having expired. I also make diligent search and inquiry in order to demand payment of the maker, but was not able to find him; that the said maker of said note, he being a non-resident, had no office or place of business in the city aforesaid; wherefore I, the said notary, do hereby protest the said note, as well against the indorsers as against the maker aforesaid, and all others whom it did and may concern, for all loss, damages, principal, interest, costs, and charges sustained or to be sustained, by reason of the non-payment aforesaid, and I thereupon, on the same day, addressed written notices to the indorsers of the said note, informing them of the demand, non-payment and protest and dishonor thereof, and that the holders look to them for its payment, and directed one to each indorser at his post office address as follows: W. L. Waring, Jr., City of Richmond; J. D. Blair, Danville, Va.; paid postage, and deposited them in the post office in this city, to be forwarded by first mail. In testimony of all which I have hereunto subscribed my name and affixed my notarial seal at the city of Richmond, aforesaid, the day and year aforesaid. J. F. Glenn, Notary Public, Richmond, Va. Notarial charges, $3.00.' That no part of said note and costs of protest has been paid. That at the time said John F. Glenn demanded payment of said note at 2:30 P. M., August 29th, 1892, W. L. Waring, Jr., did not demand the production of the note sued on in this suit. That J. L. Waring and J. D. Blair resided in Danville on the 29th August, 1892, and neither had a place of business in Richmond, Va. But whether or not, upon the whole matter aforesaid, the issue joined be for the plaintiff or for the defendant, we, the jury, do not know, and therefore we pray the advice of the court; and if, upon the whole matter, it shall seem to the court that issue is for the plaintiff upon said issue, in that case we assess the damages of the plaintiff $503, with interest thereon from the 29th of August, 1892. But if upon the whole matter aforesaid it shall seem to the court that the issue is for the defendant, then we, the jury, find for the defendants W. L. Waring and J. D. Blair upon the said issue. That the business hours of the banks in Richmond were from 9 A. M. to 3 P. M., though it is the custom in Richmond to demand payment after three P. M. H. A. Cobb, Foreman." — Whereupon, it appearing to the court that the law was for the plaintiff, judgment was rendered for the plaintiff against the defendants, in the sum of $503, with interest from the 29th day of August, 1892, as by the jury in their verdict ascertained; whereupon the plaintiff applied for and obtained a writ of error to this court.

The first question arising here is that raised by the demurrer. The declaration states a good case, and sets forth that on its due day it was duly presented for payment of the sum of money therein specified, required payment refused, and that it was duly protested, etc. And the defendant's demurrer to the plaintiff's declaration was properly overruled. The claim of the defendant

is that there was no presentment of the note, because when payment was demanded of the indorser W. L. Waring, manager of the late Business Men's Bank, Mr. Glenn did not have the note in his possession, and could not have presented it; but, as has been seen from the facts found by the jury, payment was refused by Waring, and the note not asked for, but payment refused, and the statement made that he was not authorized to represent the bank, which had ceased to do business, and had distributed its assets. Presentment of the bill or note and demand of payment should be made by an actual exhibition of the instrument itself, or at least the demand of payment should be accompanied by some clear indication that the instrument is at hand, ready to be delivered, and such must really be the case. This is requisite in order that the drawer or acceptor may be able to judge (1) of the genuineness of the instrument; (2) the right of the holder to receive payment; and (3) that he may immediately reclaim possession upon paying the amount. If on demand of payment the exhibition of the instrument is not asked for, and the party of whom demand is made declines on other grounds, a formal presentment by actual exhibition of the paper is considered as waived. Daniell Neg. Inst., p. 485, § 654, citing Lockwood *v.* Crawford, 18 Conn. 361, and Bank *v.* Willard, 5 Metc. (Mass.) 216. All the parties subsequent to the principal payor are bound only as his guarantors, and promise to pay only on condition that a proper demand of payment be made and due notice be given to them in case the note or bill is dishonored, and we repeat this is one of the fundamental principles of the law of negotiable paper; and the infrequency and the character of the circumstances which will excuse the holder from making the demand, and still preserve to him all his rights as effectually as if it were made, will illustrate the stringency of the rule itself. 1 Pars. Bills & N., p. 442. The question of excuse, then, will depend upon whether due diligence has been used, and presents the ordinary inquiry as to negligence. The principal excuses resolve themselves into two classes: First, the impossibility of demand; second, the acts, words, or position of a party, proving that he had no right or waived all right to the demand, of the waiver of which he would avail himself. That impossibility should excuse non-demand is obvious, for the law compels no one to do what he cannot perform. But it must be actual, and not merely hypothetical; and, though it need not be absolute, no slight difficulty will have this effect. Id. The circumstances which will excuse a demand are such generally as apply to a failure to present and demand payment within the required time, not absolutely. Id. 444, 445.

In this case the presentment of the note was not made at bank within the usual bank hours, with the note in possession, but, as we have seen, this was excused in this case (1) by the fact that there was no bank to present it at, and (2) because payment was refused upon the ground that the bank had ceased to do business,

and its assets were distributed; and the note was not asked for nor required. Payment being refused on other grounds, the right to have produced must be considered as waived. The note, however, was carried during the day to the place of business of the late manager of the bank, and the indorser sought to be charged, and, this being closed, it was carried to his residence, and, that being also closed, it could not be presented to him; and, although it was not in banking hours, it was during the daytime, and before the hour of rest. When the note is payable at a bank it is to be presented during banking hours, and the payer is allowed until the expiration of banking hours for payment; but when not to be made at bank, but to an individual, presentment may be made at any reasonable time during the day during what are termed "business hours," which it is held range through the whole day to the hours of rest in the evening. Pars. Bills & N. 447, citing Bank *v.* Hunt, 2 Hill (N. Y.), 635; Nelson *v.* Fotterall, 7 Leigh, 194. And in the case of Farnsworth *v.* Allen, 4 Gray, 453, a presentation made at 9 P. M. at the maker's residence 10 miles from Boston, when he and his family had retired, was held sufficient. And in Barclay *v.* Bailey, 2 Camp. 527, Lord Ellenborough sustained a presentment made as late as 8 P. M. at the house of a trader. It is only when presentment is at the residence that the time is extended into the hours of rest. If it is at the place of business it must be during such hours when such places are customarily open, or at least while some one is there, competent to give an answer. Pars. Bills & N. 448. In this case there was no presentment to the maker, who could not be found, which, however, was unnecessary, under section 2842 of the Code of Virginia. The protest was in due form, and duly protested, which was authorized by section 2849 of the Code, although the said note was payable at a bank in this State, and under section 2850 is prima facie proof of the facts stated therein, and is substantially in accordance with the finding of the jury. It therefore appears that such presentment as was requisite was made to the indorser and last manager of the bank, and that it was impossible to present the same at the bank named therein, as it has ceased to exist. We must therefore conclude that there has been sufficient diligence on the part of the plaintiff, and that the judgment of the court below in his favor was right, and should be affirmed.

CHAPTER XI.

PROTEST.

SECTION 123. The object and necessity of protest.
124. By whom protest should be made.
125. Place of protest.
126. By whom should presentment be made in preparation for protest.
127. Noting dishonor and extending protest.
128. Contents of certificate of protest — Proper time for the same.
129. Protest, evidence of what — When evidence of notice.

§ 123. **The object and necessity of protest.**— The protest is intended to furnish to the holder legal testimony of the fact that the required presentment and demand of payment has been made, and notice of dishonor given, to be used in an action on the bill or note against the drawer and indorser. In the absence of a notarial certificate of protest, these facts of dishonor and notice would have to be proved in open court by the personal testimony of the persons who had made the presentment and demand, and who had given the notice of dishonor to the drawer or indorser, who was being sued on the bill or note. Although it would be inconvenient to do this in any case of an inland bill or note, and expensive where the parties do not reside in the same place; still, it would be possible to secure the desired evidence, when needed, since all the parties in the case of inland bills and notes, are within the jurisdiction of the courts, in which the action would be brought against the drawer or indorsers. But where the bill or note is foreign,— because one or more of the parties reside beyond the jurisdiction of the courts of the State or country in which the facts of dishonor of the bill or note occurred — the party who could testify to these facts could not be compelled by judicial process to appear and give his testimony in the pending suit against the foreign drawer or indorser.

For these reasons, it has become the universal rule of the law merchant of the civilized world, that to secure and perpetuate this testimony the holder must have the foreign bill of exchange and promissory note protested for non-payment. And so necessary is protest now considered in the case of a foreign bill of exchange, that the drawer and indorsers of such a bill cannot be held liable, unless proof of dishonor is made by the protest for non-acceptance or non-payment. No other evidence will be receivable in the place of the protest. It has become an organic part of the foreign bill.[1]

As long as a promissory note has not been indorsed, protest can in no case be required, since the maker is liable in the absence of proof of dishonor of the note. But, as soon as it has been indorsed, and it is a foreign note, the protest is as necessary, in order to fasten liability on the indorser, as in the case of a foreign bill.[2]

In the case of inland bills and notes, the protest is not necessary, because the facts of dishonor can be shown by the direct testimony of the party who made the presentment and demand, and met with a refusal of payment, as has already been explained; and, independently of statute authorizing the protest of inland bills and notes, the protest of such paper means nothing and has no value whatever.[3] And so, also, in the absence of statute, the protest

[1] Union Bank *v.* Hyde, 6 Wheat. 572; Burke *v.* McKay, 2 How. 66; Commercial Bank *v.* Varnum, 49 N. Y. 269; Ocean Nat. Bank. *v.* Williams, 102 Mass. 141; Green *v.* Louthain, 49 Ind. 139; McMurchey *v.* Robinson, 10 Ohio, 496; State *v.* McCormick, 57 Kan. 440 (46 P. 777); Carter *v.* Union Bank, 7 Humph. 548 (46 Am. Dec. 89); Ashe *v.* Beasley (N. D. '96), 69 N. W. 188; Commercial Bank *v.* Barksdale, 36 Mo. 563. But see Green *v.* Elson, 31 Tex. 159.

[2] Williams *v.* Putnam, 14 N. H. 540 (40 Am. Dec. 204); Piner *v.* Clary, 17 B. Mon. 645; Bay *v.* Mitchell, 15 Conn. 15. But see Kirtland *v.* Wanzer, 3 Duer, 278; Bonar *v.* Mitchell, 5 Exch. 415.

[3] Young *v.* Bryan, 6 Wheat. 146; Union Bank *v.* Hyde, 6 Wheat. 572; Pollard *v.* Bowen, 57 Ind. 232; Smith *v.* Curlee, 59 Ill. 221; Bond *v.* Bragg, 17 Ill. 69; Wood River Bk. *v.* First N. Bk., 36 Neb. 744 (55 N. W. 239); Jones *v.* Heiliger, 36 Wis. 149; Douglass *v.* Bank of Commerce, 97 Tenn. 133; 36 S. W. 874.

of a foreign bill is no evidence of dishonor in the country in which the protest was made.[1] But in most of the United States and in England (and probably, elsewhere in the civilized world) statutes have been enacted, which permit the use of the notarial protest in the proof of the dishonor of domestic or inland bills and notes. In some of the States, it is absolutely required by statute; and probably in all, the protest is required to be made, in order to recover the special damages which are authorized by the statute to be recovered for the dishonor of the paper. But, sometimes, the statutes are permissive only, and do not absolutely require protest, in order to save the liability of drawer and indorsers.[2]

Protest is required to be made, not only of non-payment of bills and notes, but, likewise, of the non-acceptance of a bill; and, this too, when presentment for acceptance is not required to be made before the day of maturity. If the presentment for acceptance is actually made before the day of maturity, there should be a prompt protest for non-acceptance, as in the case of refusal of payment.[3]

§ 124. **By whom protest should be made.**— The general law-merchant requires the protest for dishonor, whether of non-acceptance or non-payment, to be made by a notary public, and by the same notary who presented the paper for honor, and noted its dishonor.[4] But if no notary can be found in the place of payment — a very unusual occur-

[1] Nicholls *v.* Webb, 8 Wheat. 326; Chessmer *v.* Noyes, 4 Camp. 129; Corbin *v.* Planters' N. B., 87 Va. 661 (13 S. E. 98).

[2] Bailey *v.* Dozier, 6 How. 23; Wanzer *v.* Tupper, 8 How. 234; Townsend *v.* Auld, 28 N. Y. S. 746; 8 Misc. Rep. 516; Hays *v.* Citizens' Sav. Bk. (Ky. '97), 40 S. W. 573; Presby *v.* Thomas, 1 App. D. C. 171; Brown *v.* Wilson, 45 S. C. 519; 23 S. E. 630; Ashe *v.* Beasley (N. D.), 69 N. W. 188.

[3] Bank of Washington *v.* Triplett, 1 Pet. 25; Watson *v.* Tarpley, 18 How. 517; Watson *v.* Loring, 3 Mass. 557; Allen *v.* Merchants' Bk., 22 Wend. 215 (34 Am. Dec. 289); Phillips *v.* McCurdy, 1 Harr. & J. 187.

[4] Cribbs *v.* Adams, 13 Gray, 597; Ocean Nat. Bank *v.* Wililams, 102 Mass. 141; Commercial Bk. *v.* Varnum, 49 N. Y. 269; Gessner *v.* Smith, 18 N. Y. St. Rep. 1013; 2 N. Y. S. 655; Commercial Bk. *v.* Barksdale, 36 Mo. 563; Carter *v.* Union Bank, 7 Humph. 548 (46 Am. Dec. 89).

ence at the present day,— then the protest may be made out by any reputable citizen of the place, customarily attested by two witnesses.[1]

§ 125. **Place of protest.**— In the case of protest for non-payment of a bill or note, it is patent that protest can be made only in the place of payment. But where a bill is made payable in some other place than the domicile or place of business of the drawee; since the bill must at all events be presented for non-acceptance in the domicile or place of business of the drawee; it is held that, not only must protest for non-acceptance be made there, but that the protest for non-payment may be made there also, as long as there has not been a prior acceptance of the bill by the drawee.[2]

§ 126. **By whom should presentment be made in preparation for protest.**— As it has been explained in the preceding chapters, for the purpose of receiving payment, and for every other purpose than that of protest, the proper party to make presentment for acceptance or payment is the holder or his duly authorized agent. If, however, acceptance or payment is refused, and protest for non-acceptance or non-payment is required, the notary public who is to make the protest is obliged by law to make a second presentment and demand for acceptance or non-acceptance, so that he can of his own knowledge certify to the fact of dishonor. For the same reason, it is generally held to be necessary for the notary, who issues the certificate of protest, to make the presentment himself, and not by procuration of his clerk.[3] Nevertheless, the commercial

[1] Burke *v.* McKay, 2 How. 66; Todd *v.* Neal's Admr., 49 Ala. 266; Read *v.* Bk of Ky., 1 T. B. Mon. 91 (15 Am. Dec. 86).

[2] Mitchell *v.* Baring, 4 C. & B. 35; *s. c.* 10 B. & C. 4. See Grigsby *v.* Ford, 3 How. (Miss.) 184; Neely *v.* Morris, 2 Head 595 (75 Am. Dec. 753).

[3] Ocean N. B. *v* Williams, 102 Mass. 141; Commercial Bank *v.* Varnum, 49 N. Y. 269; Gessner *v.* Smith, 18 N. Y. St. Rep. 1013; 2 N. Y. S. 655; McClane *v.* Fitch, 4 B. Mon. 600; Donegan *v.* Wood, 49 Ala. 242 (20

law recognizes the validity of a notarial protest, which is based upon a presentment by the notary's clerk, wherever there is a clearly established custom for the clerk to make the presentment in such cases.[1]

§ 127. **Noting the dishonor and extending protest — Proper time for same.** —The law merchant requires that the essential part of the protest should be made on the same day that the presentment was made; so that the errors, due to defective memory, may be reduced to a minimum.[2] In order, however, to facilitate the business of a busy notary, particularly in the case of the notary of a large bank, a distinction is made by the law between the writing in full of the certificate of protest, which must be put in evidence in an action on the bill or note against a drawer or indorser; and a memorandum of the essential facts of dishonor made by the notary in his note book. The memorandum is called, *noting the dishonor;* and if it is made on the day of maturity and presentment on the back of the paper, or in the notary's note book, and contains a complete statement of the material facts of dishonor; this memorandum is held to be a sufficient compliance with the requirements of the law, that the protest should be made out on the day of presentment. And the notary may, at his leisure, at any time thereafter before the trial of the action in which it is required, make out his certificate of protest.[3]

Am. Rep. 275); Commercial Bk. *v.* Bardsdale, 36 Mo. 563; Clough *v.* Holden, 115 Mo. 336 (21 S. W. 1071).

[1] Cribbs *v.* Adams, 13 Gray, 597; Ocean Nat. Bank *v.* Williams, 102 Mass. 141; Commercial Bk. *v.* Varnum, 49 N. Y. 269; Gawtry *v.* Doane, 51 N. Y. 90; Buckley *v.* Seymour, 30 La. Ann. 1384; Bk. of Ky. *v.* Garey, 6 B. Mon. 628; Stewart *v.* Allison, 6 Serg. & R. 324 (9 Am. Dec. 433)

[2] Dennistoun *v.* Stewart, 17 How. 606; Read *v.* Bk. of Kentucky; 1 T. B. Mon. 91 (15 Am. Dec. 86); Leftley *v.* Mills, 4 T. R. 174; Commercial Bank *v.* Barksdale, 36 Mo. 563.

[3] Dennistoun *v.* Stewart, 17 How. 606; Bailey *v.* Dozier, 6 How. 23; Cayuga Co. Bk. *v.* Hunt, 2 Hill, 635; Commercial Bk. *v.* Barksdale, 36 Mo. 563; Grimball *v.* Marshall, 5 Sm. & M. 359; Orr *v.* Maginnis, 7 East, 358.

§ 128. **The contents of the certificate of protest.** — It is desired here, to set forth what are the essential contents of the certificate.

1. The certificate should state accurately the date of presentment; and, although probably not necessary, the hour of the presentment should be given.[1]

2. If the bill or note is payable at a particular place, the certificate should set forth the fact, that presentment was made at that place.[2]

3. It seems to be required, although the reason for it is not very plain, that the certificate should contain distinct and separate statements of *presentment* for, and *demand* of, payment.[3]

4. The refusal of acceptance or of payment must be distinctly stated.[4]

5. The names of the persons, by whom and to whom the presentment was made. This is however not strictly necessary, as it may be presumed from the statements of presentment and demand that presentment has been made by and to the proper person.[5]

6. Although not necessary, it is customary to attach to the certificate a *verbatim* copy of the bill or note, with all the indorsements thereon, so that the original on which the protest was made, may be easily identified.

7. The notary must sign the certificate. Although not

[1] Walmsley *v.* Acton, 44 Barb. 312; Chatham Bank *v.* Allison, 15 Iowa, 357. See Jarvis *v.* Garnett, 39 Mo. 268; Skelton *v.* Dustin, 92 Ill. 49.

[2] People's Bank *v.* Brooke, 31 Md. 7 (1 Am. Rep. 11). See Seneca Co. Bk. *v.* Neass, 5 Denio, 329.

[3] Musson *v.* Lake, 4 How. 262; Gawtry *v.* Doane, 51 N. Y. 90; Warnick *v.* Crane, 4 Denio, 460; People's Bank *v.* Brooke, 31 Md. 7 (1 Am. Rep. 11); Watson *v.* Brown, 14 Ohio, 473; Nave *v.* Richardson, 36 Mo. 130; Commercial Bank *v.* Barksdale, 36 Mo. 563.

[4] Littledale *v.* Maberry, 43 Me. 264; Arnold *v.* Kinlock, 50 Barb. 44; Young *v.* Bennett, 7 Bush, 474. But see Derrickson *v.* Whitney, 6 Gray, 248; Wetherall *v.* Claggett, 28 Md. 465.

[5] See Hildeburn *v.* Turner, 6 How. 69; McAndrew *v.* Radway, 34 N. Y. 511; Dickerson *v.* Turner, 12 Ind. 223; Witkowsky *v.* Maxwell, 69 Miss. 65 (10 So. 453); Duckert *v.* Van Lilienthal, 11 Wis. 56; Stix *v.* Matthews, 75 Mo. 86.

absolutely necessary, in the absence of statutory requirement, it is customary for him to subscribe his name; *i. e.*, to write his name below the certificate. But a clerk may affix the signature, if done by the notary's authority or direction.[1]

8. The notary's seal must be impressed upon the certificate. Without such seal, the certificate cannot be received as *prima facie* evidence of the facts stated in the certificate.[2] Any sort of an impression on the paper would be a sufficient seal, if it bore evidence of its being the adopted seal of the notary, except, possibly, a mere scroll.[3]

9. The certificate of protest generally contains now a statement of the fact that notices of dishonor have been sent to parties secondarily liable, and the names of such parties and their addresses are given. The effect of this statement in the certificate is explained in the next section.

§ 129. **Protest, evidence of what — When evidence of notice.**— The notarial certificate is, at the common law, evidence of the facts therein stated, only so far as they fall within the duty of the notary in making the presentment and demand of payment. If the notary goes beyond this and certifies to collateral facts, having no direct bearing on the sufficiency of the presentment, the certificate is not lawful evidence of those facts; and, if they are to be proven, they must be established by other testimony.[4]

[1] Fulton *v.* MacCracken, 18 Md. 528 (81 Am. Dec. 620).

[2] Townsley *v.* Sumrall, 2 Pet. 170; Dickens *v.* Beal, 10 Pet. 582; Bk. of Rochester *v.* Gray, 2 Hill, 227; Mullen *v.* Morris, 2 Barr (2 Pa. St.) 85; Ticknor *v.* Roberts, 11 La 14; Bradley *v.* Northern Bk., 60 Ala. 258; Fletcher *v.* Ark. N. B. (Ark.), 35 S. W. 228; Carter *v.* Burley, 9 N. H. 558; Rindskopf *v.* Maloney, 9 Iowa, 540 (74 Am. Dec. 367); Bryden *v.* Taylor, 2 Har. & J. 396 (3 Am. Dec. 554). But see *contra* in absence of statute requiring seal, Huffaker *v.* Nat. Bank of Monticello, 12 Bush, 287; Bk. of Kentucky *v.* Pursley, 3 T. B. Mon. 238.

[3] Bk. of Manchester *v.* Slason, 13 Vt. 334; Connolly *v.* Goodwin, 5 Cal. 220.

[4] Townsley *v.* Sumrall, 2 Pet. 170; State *v.* McCormick, 57 Kan. 440 (46 P. 777); Dakin *v.* Graves, 48 N. H. 45; Duckert *v.* Von Lilienthal, 11 Wis. 57; Dumont *v.* Pope, 7 Blachf. 367; Wood River Nat. Bank *v.* First Nat. Bk , 36 Neb. 744 (55 N. W. 239); City Sav. Bk. *v.* Kensington Land Co. (Tenn. Ch. '96), 37 S. W. 1037.

The notarial certificate is an official act which cannot be performed by any one but a notary. In the absence of statute, enlarging his duties or his powers, his certificate cannot be taken as *prima facie* evidence of anything else than his performance of his official duties. It is now a very common, if not a universal, custom for the notary, who issues the certificate of protest, to send the notices of dishonor to the parties secondarily liable, whom the holder of the bill or note wishes to hold liable thereon; and to insert in the notarial certificate a statement that notices of dishonor have been sent to the parties therein named. In many States, this is authorized by statute. In the absence of statute, authorizing and requiring it, this is not a part of the duty of the notary. A local custom may, independent of statute, make this a part of the notary's duty for the breach of which he could be held personally liable.[1] But, unless a statute authorized it, his statement in the certificate of protest would not be accepted in court as *prima facie* evidence of the fact that the parties had been duly notified. It would have to be proven by the personal testimony of the notary.[2]

If the protest has been made by the notary, at the proper time and in the proper place, but all the statements necessary to prove a proper demand and notice do not appear in the notarial certificate, parol evidence is admissible to supply the deficiency.[3]

[1] Dickens *v.* Beal, 10 Pet. 572; Legg *v.* Vinal, 165 Mass. 555 (43 N. E. 518); Hobbs *v.* Chemical Nat. Bank, 97 Ga. 524 (25 S. E. 348); Brennan *v.* Vogt, 97 Ala. 647 (11 So. 893); Bank of Rochester *v.* Gray, 2 Hill, 237; Wood River N. B. *v.* First N. B., 36 Neb. 744 (55 N. W. 239).

[2] Dickens *v.* Beal, 10 Pet. 572; Sims *v.* Hundley, 6 How. 1; Hobbs *v.* Chemical Nat. Bank, 97 Ga. 524 (25 S. E. 348); Miller *v.* Hackley, 5 Johns. 375 (4 Am. Dec. 372); Schorr *v.* Woodlief, 23 La. Ann. 473; Lloyd *v.* McGarr, 3 Barr (3 Pa. St.) 474; Brennan *v.* Vogt, 97 Ala. 647 (11 So. 893); Couch *v.* Sherrill, 17 Kan. 622; Duckert *v.* Von Lilienthal, 11 Wis. 56; Bond *v.* Bragg, 17 Ill. 69; State ex rel. Workingmen's Banking Co. *v.* Edmunds, 66 Mo. App. 47.

[3] Magoun *v.* Walker, 49 Me. 419; Reynolds *v.* Appleman, 41 Md. 615; Peabody Ins. Co. *v.* Wilson, 29 W. Va. 528 (2 S. E. 888); Seneca Co. Bk. *v.* Neass, 5 Denio, 329; Sasscer *v.* Farmers' Bk., 4 Mo. 409.

Finally, the protest is *prima facie* evidence only, and the facts therein stated may be disproved by any competent testimony to the contrary.[1]

ILLUSTRATIVE CASES.

Clough *v.* Holden, 115 Mo. 336 (21 S. W. 1071).
Wood River Bank *v.* First Nat. Bank, 36 Neb. 744 (55 N. W. 239).

Sufficiency of Protest — Presentment After Ordinary Business Hours by Notary.

Clough *v.* Holden, 115 Mo. 336 (21 S. W. 1071).

In banc. Appeal from circuit court, Jackson county; R. H. Field, Judge.

Action by David M. Clough against John D. Bancroft and Howard M. Holden on a note. The case was dismissed by plaintiff as to Bancroft. From a judgment for plaintiff, defendant Holden appeals. Reversed.

For decision in division No. 1, see 20 S. W. Rep. 695.

The other facts fully appear in the following statement by Gantt, J.:—

This action was originally commenced against John D. Bancroft as maker, and Howard M. Holden as indorser, of the following note: "$4,000. Chicago, October 6th, 1888. On the first day of July, 1889, after date, I promise to pay to the order of the Union Tie Company, Chicago, four thousand dollars, at room 70, Home Insurance Building, Chicago, Illinois. Value received. No. 9,995. John D. Bancroft." [Indorsed] "Union Tie Company. J. D. Bancroft, Treasurer. Pay to the order of D. M. Clough, Esqr. Howard M. Holden, Kansas City, Mo. D. M. Clough. Pay D. Hoyt, cashier, or order, for collection, account of Bank of Minneapolis. M. Bofferding, Cashier."

This last indorsement was erased when the action was begun. John D. Bancroft, the maker, entered his voluntary appearance to the cause, and filed his answer. Holden, the indorser, was duly served in Jackson county, and filed his answer. After the issues were made up, Bancroft applied for a change of venue. pending which the plaintiff dismissed as to him, to which action of the court defendant Holden excepted. The answer of defendant Holden contained, first, a general denial, and these special defenses: "(2) This defendant, for his further answer to said

[1] Dickens *v.* Beal, 10 Pet. 572; Dunn *v.* Parson, 66 Hun, 635; Johnson *v.* Brown, 154 Mass. 105 (27 N. E. 994); Peabody Ins. Co. *v.* Wilson, 29 W. Va. 528 (2 S. E. 888); Union Bk. *v.* Fowlkes, 2 Sneed, 554; Gessner *v.* Smith, 18 N. Y. St. Rep. 1013; 2 N. Y. S. 655.

petition, states that it is true that the said Bancroft made and the said Holden indorsed the note described in said petition, but defendant further states that he was merely an accommodation indorser, and that he had no greater or further interest in said note than as accommodation indorser for the said Bancroft. (3) This defendant further states that the said note was obtained from the said Bancroft by fraud and misrepresentation, and without consideration, and that the plaintiff at the time he took said note knew that the same had been obtained from said Bancroft by fraud and misrepresentation, and without consideration, and that he never paid value for the same, and that said Holden was merely an accommodation indorser on said note. (4) This defendant, further answering, states that plaintiff in this cause did institute suit against him and the said John D. Bancroft, the maker of said note, and that since the institution of said suit, and after answer filed by him in this cause, he refuses further to prosecute his action against the said Bancroft. Wherefore this defendant, having fully answered, asks to be hence discharged, with his costs in this behalf created." To this answer, plaintiff filed the following reply: "The plaintiff, for amended reply to the answer of defendant in the above entitled cause, says it is true that the defendant Bancroft made and the said Holden indorsed the said note described in the petition, but denies each and every other allegation contained in said answer, and says that for value received before the maturity thereof the said note was indorsed and delivered to this plaintiff, and he is now the owner and holder thereof in good faith, without any knowledge then or now that there was any fraud or defect or failure of consideration in any wise connected with said note, and prays judgment as in the petition." The trial resulted in a judgment for plaintiff, from which defendant Holden has appealed to this court. The errors assigned will be considered in the order in which it is alleged they occurred.

GANTT, J. (*after stating the facts*). 1. To sustain his case against defendant Holden as an indorser, plaintiff offered a copy of the note, with all the indorsements thereon as above set forth, with the following certificate of protest: "State of Illinois, Cook county — ss.: Be it known, that on this 3d day of July, in the year of our Lord 1889, I, Ben. S. Mayer, notary public, duly commissioned and sworn, and residing in Chicago, in said county and State, at the request of the Continental National Bank, went with the original note, of which a true copy is above written, to the office of John D. Bancroft, Room 70, Home Ins. Bldg., at 5:20 P. M., to demand payment thereon, and found the door locked, whereupon I, the said notary, at the request of the aforesaid, did protest," etc.; which certificate was duly signed by the notary, and sworn to before Howard Rope, another notary. To the introduction of this certificate of protest defendant objected, for the reason that it appeared the note was payable at an office, room 70, in an insurance building, and the certificate

does not recite that this note was presented during business hours; that it could not be said, as a matter of law, that 5:20 P. M. was within business hours. The court overruled this objection, to which defendant excepted. Defendant afterwards called Thomas Wright, and this witness having testified that he was and had been a resident of Chicago for a year and a half, and knew the location of the Home Insurance Building, in said city, he was asked what were the ordinary business hours in Chicago, and within what hours business men could usually be found in their offices. The court refused to permit him to answer the question. After repeated efforts to show the custom as to business hours, all of which were overruled by the court, "defendant offered to prove by this witness that this presentation and demand for payment were not made in the usual business hours of office men and business men in the city of Chicago," which was by the court excluded, and defendant excepted.

The admission of the certificate over objection, and the rejection of the evidence to show that a demand for payment, made at 5:20 P. M., was not within business hours, present the question very clearly, in two aspects. The note sued on was made payable at a specified business place. If a negotiable promissory note or bill of exchange is made payable at a particular bank, presentment for payment must be made at said bank during banking hours. Tied. Com. Paper, § 317; 1 Daniel Neg. Inst., § 600; Story Prom. Notes (7th ed.), §§ 226, 227; Story Bills, §§ 236–249; Swan *v.* Hodges, 3 Head, 251. And it is well settled that if a promissory note is payable at a particular business place, whether bank or not, it will be sufficient for the holder, in order to charge the indorser, to present the same for payment at the specified place, within business hours, and he is under no obligation, in case of dishonor at that place, to present it for payment elsewhere, or personally to the maker. Lawrence *v.* Dobyns, 30 Mo. 196; 1 Daniel Neg. Inst., § 635; Story Prom. Notes, § 234; Sulsbacher *v.* Bank, 86 Tenn. 201; 6 S. W. Rep. 129; Brent's Exr's *v.* Bank, 1 Pet. 92; Cox *v.* Bank, 100 U. S. 716; Hawkey *v.* Borwick, 4 Bing. 136; Bank *v.* Smith, 11 Wheat. 171. That the note in question was presented at the place designated — the office of Bancroft, Room No. 70, Home Insurance Building, Chicago — on the day it matured, does not admit of question. On this point the notary's certificate is explicit, but the defendant insisted the certificate of protest was insufficient in not stating that he presented the note within business hours. He states that he presented it at 5:20 o'clock, P. M. The certificate is sufficient on its face to raise the presumption that he made the demand within business hours. Sulzbacher *v.* Bank, 86 Tenn. 205; 6 S. W. Rep. 129; Baumgardner *v.* Reeves, 35 Pa. St. 250; Wiseman *v.* Chiappella, 23 How. 368, 379, 380; Burbank *v.* Beach, 15 Barb. 326; Bank *v.* Hunt, 2 Hill, 635. In these cases in the supreme court of the United States and New York the certificate was general, and the

courts ruled the presumption was that the notary had made the presentment during business hours. We take it that 5:20 P. M. is not such an unusual hour that this court would be justified in holding, as a matter of law, that it was not within business hours in Chicago. American courts are wont to take judicial notice of the banking hours of any large city lying within the area of the jurisdiction of the court, though there is no authority for supposing that the banking hours of the city of New York would be considered as judicially known to the courts of Boston or Chicago, or vice versa. "Unquestionably proof would have to be introduced." Daniel Neg. Inst., § 601; Morse Banks, 371. But although the notary's certificate is prima facie evidence that the note was presented for payment in business hours, it is only prima facie.

This brings us to the point of controversy in this case, the action of the trial court in refusing to permit the appellant to show that 5:20 P. M. was not within business hours in Chicago. It will be observed that the competency of the witness to speak as to the custom was not challenged because he had not qualified himself. The objection was not to the competency of the witness, but of his testimony. It is too late to raise the question of personal disqualification for the first time in this court. Seligman *v.* Rogers, 21 S. W. Rep. 94 (division No. 2, at this term). The ruling of the court was made squarely upon the subject-matter of the proposed evidence. If the evidence was competent, then it was error to exclude it, because it fully met the requirement, in that the inquiry was as to the general hours of business in Chicago, among business and office men. The question itself suggested its materiality, but counsel, unwilling to risk that, went further, and made the offer of proof, which clearly shows it was material, thus complying with the rule announced in Jackson *v.* Hardin, 83 Mo. 178, 186; Thomp. Bills, 302; 1 Daniel Neg. Inst., § 601. "When the presentment is at the place of business it must be during the hours when such places are customarily open, or at least while some one is there competent to give answer. It is only when presentment is at the residence that the time is extended to the hours of rest." Id. 603. The rule thus announced by Mr. Daniel is approved by the other text writers on commercial law generally. The question, it must be remembered, is not whether a demand actually made on Bancroft on the day in question after business hours would be good, but is a call at his business office, after the expiration of business hours, after it was closed for the day, with no other effort to find him, a sufficient presentment to dishonor the bill and hold the indorser? In other words, can a party invoke the right to this constructive demand, without making it within business hours? We think that both reason and the authorities generally hold that such a presentment is not sufficient to bind the indorser. Dana *v.* Sawyer, 22 Me. 244; Parker *v.* Gordon, 7 East, 385; Shed *v.* Brett, 1 Pick. 412; Baumgardner *v.* Reeves, 35 Pa. St. 250;

Swan *v.* Hodges, 3 Head, 251; Wiseman *v.* Chiappella, 23 How. 368, 380; Story Bills (4th ed.), § 236; Bayley Bills & N. (5th ed.), c. 7, § 1, p. 199. The rule is tersely stated by Thompson, J., in Baumgarten *v.* Reeves, supra: "It is the duty of a notary when he receives a bill or note, intended to be protested, to make a demand of the party primarily liable, at his usual place of business, within business hours." In Elford *v.* Teed, 1 Maule & S. 28, Lord Ellenborough, C. J., said: "There was not any text writer upon whose authority a presentment of a bill by a notary at a house of business, after it was closed, could be sustained. It is laid down in Marius that it must be made during times of business, at such seasonable hours as a man is bound to attend, by analogy to the horal juridicae of the courts of justice." Mar. Bills (2d ed.), 187. To this line of authorities, respondent opposes the case of Skelton *v.* Dustin, 92 Ill. 49, 54. We have examined that case with care, and we cannot find anything in the decision based upon the facts of the case that is in conflict with the view we have taken of the law on this subject. That part of the opinion relating to the point under discussion is as follows: "It is said that a bill of exchange should be presented for payment on the day it is payable, during the business hours on that day (Strong *v.* King, 35 Ill. 9); and it is claimed therefore that it must be affirmatively shown, which it is said was not done in this case, that the bill was so presented during his business hours. The only evidence there is as to the time of day the bill was presented for payment is found in the notarial certificate of protest, which states that the notary, after the close of bank hours, presented the same [the bill] at the office of W. C. Barrett & Co., Indianapolis, Indiana, and demanded payment thereof, the time limited for payment having expired. The certificate is presumptive evidence of presentment during the proper hours of business. These, except where the paper is due from a bank, for the purpose of presenting a note or bill for payment, range through the whole day down to bedtime in the evening." Bank *v.* Hunt, 2 Hill, 635; Farnsworth *v.* Allen, 4 Gray, 453; Edw. Bills & N. 536, marg. "There is no evience that W. C. Barrett & Co. were bankers. The statement that the 'time limited for payment had expired' does not import, as contended, that the presentment for payment was after the close of business hours. It means no more, we think, than that payment of the bill had become due." To all of which we assent. That case holds, as we have already held, that the certificate of the notary was prima facie evidence that the note was presented "during the proper hours of business." In that case the defendant relied upon the objection to the certificate. In this case, when that objection was overruled, defendant offered to show affirmatively that the presentment was not within business hours. No such proof was offered in Skelton *v.* Dustin. Nor do we question that in different communities "business hours range through the whole day down to bedtime." It is for this reason

that we think it is competent and proper to allow the indorser to show what range they took in the city of Chicago at the time this presentment was made, or attempted to be made. Mr. Daniel lays it down, in section 601, Neg. Inst., that "it is for the jury to say what are business hours, and, in fixing them otherwise than in reference to banks, they are to have reference to the general hours of business at the place, rather than the custom of any particular trade." Certainly the authorities cited by the supreme court of Illinois in no way militate against the views we have taken. In Bank *v.* Hunt, Judge Cowen begins his opinion with the statement that "the bill of exchange in this case was payable, generally, mentioning no place." No objection was made at the trial that the presentment, which was made at No. 4 Wall street, where the survivor transacted business, should have been at his residence, or any place, "nor was any made to the manner of presentment, or the day." He holds that the notary's certificate is prima facie evidence that the demand was made at a proper time in the day. If an improper time, it was for the opposite party, by cross-examination or otherwise, to show it. In Farnsworth *v.* Allen, 4 Gray, 453, no place of payment was named in the note. The notary on the last day of grace presented it to the maker at his residence, after he had retired. It was held good. Bigelow, J., said: "The note declared on, not being payable at a bank, or at any place where business was transacted during certain hours in each day, was properly presented to the maker at his residence;" but even in that case the learned judge held that such a note ought to be presented within reasonable hours, and he concludes that 9 o'clock on 23d August is not unreasonable, when it was found necessary to drvie nine miles into the country to find the makers. Edw. Bills & N., § 716, is the remaining citation. The author says: "Where a note is not drawn payable at a particular place, or at a bank, a demand may be made upon the maker at his residence at any time before the usual hours of rest." But a reference to the work will show that the author is discussing at this place the right of the maker to the whole day in which to pay, and that a suit brought during the last day of grace is premature. At section 719, in discussing the point we have under consideration, he says: "When payable at a bank, the note should be presented before the hour of closing business of that kind that day. * * * or when payable at the counting room, office, or store of the maker or acceptor, they should be presented there within the usual hours of business." Judge Rapallo, in Bank *v.* Burton, 58 N. Y. 430, refers to Parker *v.* Gordon, 7 East, 387, and Elford *v.* Teed, 1 Maule & S. 28, as the cases upon which the law of presentment of commercial paper is based. Lord Ellenborough himself qualified his own opinion to this extent, that a presentment at a bank after banking hours was sufficient, provided a person was stationed there by the banker to return an answer. That case and Bank *v.* Hollister,

17 N. Y. 46, stand upon their own peculiar facts, but nowhere is it intimated in either that the court has departed from the general rule. Woodruff, J., in Manufacturing Co. *v.* Bishop, 3 E. D. Smith, 48, commenting upon Garnett *v.* Woodcock, 1 Starkie, 475, says: "It proceeds upon the distinct ground that if a banker appoint a person to attend, in order to give an answer, a presentment would be good if made before 12 o'clock at night;" but he insists that the general rule is not at all repudiated by that case, but rather affirmed. See authorities cited, loc. cit. p. 54. Our conclusion is that the evidence is material and competent, and the court committed reversible error in excluding it.

2. For the reason that the evidence was admissible, it follows that the instruction was too narrow, in that it did not require the jury to find that the note had been presented for payment to the maker within business hours at his place of business, but only required the jury to find that notice of protest had been given to defendant Holden. His liability was conditioned upon the proper demand upon John D. Bancroft.

3. The remaining point for decision is one of pleading. Under his answer, and to sustain the third paragraph thereof, defendant offered John D. Bancroft, as the maker of the note, as a witness. After Bancroft had testified that the note in suit was a renewal of two former notes given by him to one Warren H. Leland, aggregating $6,892.09, and had testified that fraud had been perpetrated on him by Leland in obtaining said notes, and that Clough, the plaintiff, knew it, when he reduced the notes to $4,000, the amount of the one in suit, the court, over the objection of counsel for defendant, permitted counsel for plaintiff to take the witness, and identify four letters from the witness to Clough, and read the same to the jury. In these letters Bancroft agrees to give the $4,000 note in suit and $500 in cash for the two notes previously given to Leland, June 23, 1888. He tells Clough in his letters that Leland had cheated, defrauded and duped him (Bancroft), but he disliked to see Clough suffer, and accordingly offers this settlement. These negotiations result in Clough taking this note, and surrendering the old notes and $10,000 stock in the Chippewa Lumber Company. Defendant, after all this evidence was in, without objection from plaintiff, offered to show that Clough and Leland were partners in all these transactions, and that Clough was a party to the fraud by which Leland obtained the original notes, but that Bancroft was ignorant of these facts when he gave the note in suit; and he made this proposal: "I propose to show by this witness that the consideration of the original notes wholly failed, and were without consideration, and that at the time they were given the original notes were given for property or an interest in property sold by Leland to Bancroft; that Clough was part owner and a partner of Leland at the time of the sale of that property to Bancroft, and was acting for and in behalf of Leland at the time this property was sold, and that these notes were then transferred to Clough; and that

Bancroft, without notice of the fact at that time of the extent to which he had been deceived as to the consideration of the note,— as to the amount of property which was turned over in payment of the note,— made this settlement, and gave this new note for the others to Clough; and that Clough had full notice at the time the original notes were given, in law and in fact, of the consideration of these notes, as well as the note that was in suit. We offer to prove that." To which plaintiff objected as incompetent, and not pleaded in the answer. Which objection the court sustained, and defendant duly excepted. Counsel for defendant then went further and offered to show that the original notes were given for property which Leland represented was in existence, but did not exist; that he did not have the property; that Bancroft relied on his representations, and gave the note for it; that the property was represented to be a new sawmill, and certain lumber and shingles, and certain timber in the forest, at Point au Frene, Mich. "These notes were given in consideration of the sale of this alleged amount of property; that Mr. Bancroft was ignorant himself as to the value of this property or the amount of it, and was deceived and swindled by these representations; and that he gave these notes after that. When these notes became due, they turned up in the possession of and in the custody of Clough, who claimed to be the owner of them. He then supposed that Clough had bought them in good faith, and made this settlement with him by giving him a new note, when Clough, as a matter of fact, was a partner in this, all the time, with Leland. That is the offer. The Court: I don't think the answer is sufficient to raise any question of fraud, and the offer is excluded. (To which action of the court in refusing to admit the testimony offered, the defendant then and there duly excepted.)" The answer alleged that the note in suit was obtained from Bancroft, the maker, by fraud and misrepresentation, and without consideration, and that plaintiff knew it had been so obtained, and that he never paid value for the same. Was it competent, under such an answer, to prove the facts which defendant offered to prove in regard to the original notes? We think not. The pleader saw fit to confine his charge of fraud to the note in suit. Had he only offered to show that the note in suit was obtained by fraud, the evidence would have been competent, under his general allegation of fraud, under the rule in Edgell *v.* Sigerson, 20 Mo. 494, but it is not reasonable that under such an answer the plaintiff would expect to be prepared to meet charges of fraud in a remote transaction, out of which this note finally grew, and to the obtaining of which plaintiff was ostensibly, at least, a stranger. If defendant desired to show that the note in suit had not other consideration than the two notes to Leland; that plaintiff was in fact a party to a fraud in obtaining them; and that the said two notes were without consideration, or had wholly failed,— it was his duty by an appropriate answer to state these facts, and advise the plain-

tiff of the defense on which he expected to rely. The present answer is not sufficient for that purpose, either at common law or under the Code, and the trial court properly so held. It may be as well to remark that the cases of Edgell *v.* Sigerson, 20 Mo. 494; Smalley *v.* Hale, 37 Mo. 102, and Fox *v.* Webster, 46 Mo. 181, have never been overruled, but they only held that pleas of fraud in general terms were good in answer, and when the fraud charged referred only to matters stated in the petition. The bare allegation of fraud has never been sustained as sufficient in a petition, under our code, either in law or equity. We have always required the facts constituting the fraud to be averred. A satisfactory reason for the distinction between an answer or other pleading and a petition, in this respect, would be hard to give. The writer will not attempt one. Bliss Code Pl., § 339. The cases of Reed *v.* Bott, 100 Mo. 62; 12 S. W. Rep. 347, and 14 S. W. Rep. 1089; and Hoester *v.* Sammelmann, 101 Mo. 619; 14 S. W. Rep. 728, were causes in equity, and what was said in them in regard to pleading was intended to refer to pleading in equity, though neither of the judges who wrote them thought necessary to advert to the distinction.

It becomes unnecessary to discuss the other propositions referred to in the brief of respondents, for the reason that we cannot anticipate, either that defendant will not tender back the old notes and Chippewa Lumber Company stock, nor that plaintiff will rely upon the compromise. It will be ample time to pass upon those questions when they are fairly in the records. The judgment is reversed, and the cause remanded for a new trial in accordance herewith. All concur, except Sherwood, J., who dissents, and Barclay, J., who expresses his views separately. Barclay, J., concurs in the judgment on the ground stated in the first paragraph of the opinion of the court, but dissents from the third paragraph, and refers to his opinion in Reed *v.* Bott (1889), 100 Mo. 67; 12 S. W. Rep. 347, and 14 S. W. Rep. 1089, for a statement of his views upon the point of difference.

Barclay, J. (dissenting). As I do not concur in the conclusion reached that the judgment in this cause should be reversed, I herewith file as reasons for my dissent herein the original opinion filed by me in Division No. 1 of this court, and which received at the time the unanimous assent of all the members of that division. That opinion has been followed sub modo by the majority as to paragraph 1, which in effect declares that you cannot plead one fraud and prove another; but when the majority come to the question discussed, both in the brief of plaintiff and in that of defendant in his motion for rehearing, as to the necessity of rescission or offering to rescind the compromise contract, in order to make the plea of fraud good, as all the authorities hold, it is said: "It becomes unnecessary to discuss the other propositions referred to in the brief of respondent, for the reason that we cannot anticipate, either that defendant will not tender back the old notes and Chippewa Lumber Company

stock, nor that plaintiff will rely upon the compromise. It will be ample time to pass upon those questions when they are fairly in the record." But if, as the authorities show, after a contract of compromise has been entered into, the fraud in securing that contract cannot be successfully pleaded without being coupled with a plea of rescission or offer to rescind that contract, and as both parties discuss the point in their briefs, it seems to me it was absolutely necessary for this court to rule the point, unless it is thought advisable to compel the parties to come back again to this court, in order to learn whether a plea of fraud in making a contract is good, uncoupled with a return or offer to return that which was obtained under that fraudulent contract. Here, we have the plaintiff contending that rescission or offer to rescind is absolutely necessary; the defendant denying this: in such circumstances of antagonism, it really does not seem that it would require any very great stretch of either inference or imagination to "anticipate that defendant will not tender back the old notes," etc., or that plaintiff will rely upon the compromise contract. But the necessity of such return or offer to return is "fairly in the record," if it be true that in the circumstances stated the plea of fraud is not good, where it stands alone, uncoupled with the averment aforesaid. And where a petition or answer is bad on its face, though no objection be raised to its sufficiency, this court of its own motion will raise and rule the point here for the first time. Walker *v.* Bradbury, 57 Mo. 66; Smith *v.* Burrus, 106 Mo. loc. cit. 97; 16 S. W. Rep. 881, and cases cited.

Liability of Collecting Bank for Failure to Protest — What Protest Includes — When Protest Necessary in Case of Inland Bills and Notes.

Wood River Bank *v.* First Nat. Bank, 36 Neb. 744 (55 N. W. 239).

Error to district court, Hall county; Harrison, Judge.

Action by the First National Bank of Omaha against the Wood River Bank. Plaintiff had judgment, and defendant brings error. Affirmed.

Post, J. This was an action in the district court of Hall county to recover for the failure of the defendant below, plaintiff in error, to give notice of the dishonor of certain checks received by it for collection from the plaintiff below, by reason of which certain indorsers thereon were discharged, to the damage of the latter. The facts, as they appear from the pleadings and proofs, are substantially as follows: About the 11th day of January, 1887, at Ravenna, in Buffalo county, one Hildebrandt drew 11 checks, to the order of as many different payees, upon the defendant, the Wood River Bank, doing business at Wood River, Hall county, amounting, in the aggregate, to $737.28. The checks aforesaid were all cashed by the Farmers' Bank of Ravenna upon the indorsement of the several payees, and upon the day above named were transmitted by it, with proper indorse-

ments, for collection, to the First National Bank of Omaha. On the evening of the next day, January 12th, the last-named bank forwarded them by mail, properly indorsed, for collection, to the defendant bank, at Wood River, with instructions to protest unless promptly paid. The evidence is conflicting with respect to the time of the receipt of the checks by the defendant. If we regarded that question as decisive of the case, we would feel constrained to resolve it in favor of the defendant, notwithstanding the finding of the jury that they were received by it on the evening of the 13th. Both Hockenberger, the cashier, and Hallister, the president, testify positively that the checks were received by the bank on the afternoon of the 14th. But the judgment is right, nevertheless. It is evident from their testimony that the checks were received at the bank before the close of its business on the 14th; that they were opened and examined by the witnesses, who were both aware that there were no funds to the credit of the drawer, and who delayed giving notice or taking any steps for the protection of the plaintiff below, in order to enable Hildebrandt to provide funds to balance his account the next day. It is admitted, also, that the defendant bank continued to pay Hildebrandt's checks in favor of home customers, although no entries appear to his credit on its books subsequent to the 13th. The jury were warranted, upon the admitted facts, in finding that the bank intended to accept the bills, and that by its delay it became liable thereon. Bank *v.* McMichael, 106 Pa. St. 460.

Checks like those in question are to be regarded as inland bills of exchange. Therefore, protest is not essential in order to preserve the rights of antecedent parties (Hughes *v.* Kellogg, 3 Neb. 194; Daniel Neg. Inst. 926; Chit. Bills [8th ed.], 500, 501), although the holder is required to exercise the same degree of diligence in giving notice of dishonor as in cases where a formal protest is necessary. The term "protest," as applied to inland bills, is used in its popular sense, and means the steps essential in order to charge the drawer and indorsers. Daniel Neg. Inst. 929; Ayrault *v.* Bank, 47 N. Y. 570. It was the duty of the defendant bank to promptly give notice of the non-payment of the checks, either directly to the bank from which they were received, or to place them in the hands of a notary public for protest and notice. Bank checks, unlike bills of exchange, are due on the day they are presented for payment, and not entitled to days of grace. Boone Banking, 165, 250; Morrison *v.* Bailey, 5 Ohio St. 13; Champion *v.* Gordon, 70 Pa. St. 474; Fletcher *v.* Thompson, 55 N. H. 308; 2 Amer. & Eng. Enc. Law, 398. The checks in question were dishonored on the 14th, when received through the mail, and payment refused for want of funds. Both the president and cashier, the only managing officers of the bank, knew that Hildebrandt's account was overdrawn. There was, therefore, no occasion for time to examine their books. It is said by Chancellor Kent (3 Kent Comm. 105): "According to modern doctrine, the notice must be given by the first direct and regular conveyance. This

means the first mail that goes after the day next to the third day of grace, so that if the third day of grace be on Thursday, and the drawer and indorser reside out of town, the notice may be sent on Thursday, but must be put into the post office or mailed on Friday, so as to be forwarded as soon as possible thereafter."

The next inquiry is whether by delivering the checks to the notary public on the 15th for protest, the defendant discharged its duty to the plaintiff, for it is clear, upon authority, that that was the latest day on which notice could have been given in order to charge the indorsers. The rule sanctioned by the weight of authority is conceded to be that a bank which places paper in the hands of a notary public, with directions to proceed in such manner as to protect the rights of the beneficial owner and indorsers, will not be held liable for the failure of the notary to discharge his duty. See Boone Banking, 205; 2 Amer. & Eng. Enc. Law, 113. But this case cannot be held to be within the rule just stated. Here the notary was the president and managing officer of the bank, and who, being aware of the dishonor of the checks on the 14th, did not protest them for nonpayment, or notify the plaintiff or other indorsers of that fact, until the 17th. It is evident, too, that the cashier was aware of the dereliction of the president, for the checks appear to have remained in the bank during all the time, and whatever was done by the latter by way of noting protest, giving notice, etc., was with the knowledge of the former. It is true the 16th was Sunday, but the default occurred on the 15th. It was the duty of the notary, on that day, to notify the plaintiff, by mail, of the dishonor of the paper. The failure to protect the plaintiff as an indorser is directly attributable to the fault of the managers of the bank, and it will not be permitted to take refuge behind the notary, and to interpose his negligence as a defense. Upon the facts of this case the notary will not be held to be the agent of the plaintiff, but rather of the defendant. Bank *v.* Barksdale, 36 Mo. 563.

2. The plaintiff below assumed the burden of proving the solvency of the first indorsers, the payees of the several checks. For that purpose, Mr. Davis, the cashier of the Farmers' Bank of Ravenna, was called as a witness, and testified that he was acquainted with the financial standing of the parties named, and that he considered them good for the amounts named in the checks bearing their respective indorsements. From his cross-examination it appeared that one or more of them were somewhat embarrassed financially. It is now urged that there is not sufficient evidence of the solvency of the indorsers, hence it cannot be said that the plaintiff has been damaged. This argument is fully answered by the opinion of Judge Lake in Steele *v.* Russell, 5 Neb. 211. The fact that the indorsers may have been unable to meet all obligations at maturity does not conclusively establish their insolvency, such as to constitute a defense in this action. The judgment of the district court is right, and is affirmed. The other judges concur.

CHAPTER XII.

NOTICE OF DISHONOR.

SECTION 130. Necessity of notice.
131. Who may give the notice.
132. To whom notice should be given.
133. The time allowed for giving notice.
134. Manner of giving notice, when important.
135. Manner of giving notice where parties to be notified reside in the same place.
136. Personal notice, how and when served.
137. Manner of serving notice on persons residing elsewhere.
138. What is meant by "residing in the same place."
139. Form and requisites of the notice of dishonor.
140. Allegation and proof of notice.

§ 130. **Necessity of notice.** — Whenever a bill or note is dishonored by a refusal of the drawee or maker to accept or pay, it becomes the duty of the holder, after making presentment and securing protest, whenever that is necessary, to give immediate notice of the dishonor to all secondary obligors — the drawer and indorsers — whom he wishes to hold liable. The liability of these parties depends upon the full performance of the condition, that the holder has made presentment, and given the required notice of non-payment. If the condition is broken by the failure to give the notice to the party, whom the holder wishes to hold liable, such drawer or indorser is completely discharged, not only from all liability on the bill or note, but, likewise, on the original contract, in settlement of which the bill or note was issued or indorsed.[1] Notice is not required to be

[1] Musson *v.* Lake, 4 How. 262; Phipps *v.* Harding, 70 Fed. 468; 17 C. C. A. 203; Smith *v.* Miller, 43 N. Y. 171 (3 Am. Rep. 690); Shipman *v.* Cook, 16 N. J. Eq. (1 C. E. Gr.) 251; Leonard *v.* Olson (Iowa, '97), 68 N. W. 677; Allan *v.* Eldred, 50 Wis. 136 (6 N. W. 565); Betterton *v.* Roope, 3 Lea, 215.

given to the acceptor of a bill or maker of a note,[1] and to no one, if the bill or note is for any reason non-negotiable.[2]

§ 131. **Who may give the notice.**— In order that a notice of dishonor may be effective, it must be given by a party to the bill or note, or the representative of such a party. A total stranger to the paper and to the parties cannot give the notice.[3] Where a representative or agent of a party to the paper gives the notice, he must be duly authorized; but, being authorized, he may give it either in his own name, or in that of his principal.[4]

The holder need only give notice to the last indorser; and if the drawer and prior indorsers do not receive notice from any authorized source, they are discharged. But if the last indorser, who receives notice, gives notice for his own protection to the prior indorsers and drawer, as he has a right to do; his notice to them will not only preserve their liability on the paper for his own benefit, to be enforced when he is required to make his own indorsement good to the holder; but it will inure to the benefit of the holder, who can then sue the drawer and prior indorsers, as if he or his agent had given to them the required notice. But before a later indorser can give notice, so as to bind the parties, either to himself or to the holder, notice must have been sent to him.[5] On the other hand, if the holder

[1] Marion Nat. Bk. *v.* Phillips Admr. (Ky.), 35 S. W. 910; Pritchard *v.* Smith, 77 Ga. 463; Miller *v.* Clendenin, 42 W. Va. 416 (26 S. E. 512). See *ante*, §§ 92, 114.

[2] Pitman *v.* Breckenridge, 3 Gratt. 127, and see Cundy *v.* Marriott, 1 B. & Ad. 696.

[3] Stanton *v.* Blossom, 14 Mass. 116 (17 Am. Dec. 198); Chanvine *v.* Fowler, 3 Wend. 173; Meise *v.* Newman, 78 Hun, 428; Juniata Bk. *v.* Hale, 16 Serg. & R. 157 (16 Am. Dec. 558); Ex parte Barclay, 7 Ves. 598.

[4] Harrison *v.* Ruscue, 15 M. & W. 231; Shed *v.* Brett, 1 Pick. 401 (11 Am. Dec. 209); East Haddam Bk. *v.* Scoville, 12 Conn. 303; Smedes *v.* Utica Bk., 20 Johns. 372; Cowperthwaite *v.* Sheffield, 1 Sandf. 416; Ashe *v.* Beasley (N. D.), 69 N. W. 188; Renick *v.* Robbins, 28 Mo. 339; Bank of Missouri *v.* Vaughn, 36 Mo. 90; Swayze *v.* Britton, 17 Kans. 629; Drexler *v.* McGlynn, 99 Cal. 143 (33 P. 773).

[5] Chapman *v.* Keane, 3 Ad. & El. 193; Boteler *v.* Dexter, 20 D. C. 26; Bachellor *v.* Priest, 12 Pick. 399; City N. B. *v.* Clinton Co. N. B., 49 Ohio

has notified the drawer and all the indorsers, the notices will inure to the benefit of any one of the intermediate indorsers, who is compelled to pay the bill or note.[1] It has been held that the acceptor of a bill or the maker of a note may give the notice.[2]

If the holder be dead, his personal representative must give the notice, within a reasonable time after his appointment and qualification.[3]

§ 132. **To whom notice should be given.** — All the parties, secondarily liable, whom the holder wishes to hold liable, must be notified. And this is true, even of an indorser for collection only.[4] And whenever the circumstances require that demand should be made after maturity, where there has been an indorsement and transfer after maturity, notice must be given to the overdue indorser, as well as to the indorsers before maturity.[5] But wherever presentment has been made at maturity, and proper

St. 351 (30 N. E. 985); Stafford *v.* Yates, 18 Johns. 327; Aldine Mfg. Co. *v.* Warner, 96 Ga. 370 (23 S. E. 404); Renshaw *v.* Triplett, 23 Mo. 213; Stix *v.* Matthews, 63 Mo. 371; Jarnigen *v.* Stratton, 95 Tenn. 619 (32 S. W. 625); Swayze *v.* Britton, 17 Kans. 627; Big Sandy N. B. *v.* Chilton, 40 W. Va. 491 (21 S. E. 774); Wood *v.* Callaghan, 61 Mich. 402 (28 N. W. 162).

[1] Beale *v.* Parrish, 20 N. Y. 407 (75 Am. Dec. 414).

[2] Chapman *v.* Keane, 3 Ad. & El. 193; Brailsford *v.* Williams, 15 Md. 150 (74 Am. Dec. 559); French *v.* Jarvis, 29 Conn. 347 (notice by holder enuring to indorse after maturity); First N. B. *v.* Ryerson, 23 Iowa, 508; Johnson *v.* Harth, 1 Bailey, 482; Glasgow *v.* Pratte, 8 Mo. 336 (40 Am. Dec. 142). But see Sebree Deposit Bk. *v.* Moreland, 96 Ky. 150 (28 S. W. 153).

[3] White *v.* Stoddard, 11 Gray, 258 (71 Am. Dec. 711).

[4] Scott *v.* Lifford, 9 East, 347; Bank of Missouri *v.* Vaughn, 36 Mo. 90; Whittier *v.* Collins, 15 R. I. 44; 23 A. 39 (although secured by collaterals); Sibley *v.* Am. Exch. Nat. Bank, 97 Ga. 126 (25 S. E. 479); McNeil *v.* Wyatt, 3 Humph. 125; Rosson *v.* Carroll, 90 Tenn. 90 (16 S. W. 66); Fiske *v.* Pratt, 154 Mass. 367 (28 N. E. 282).

[5] Colt *v.* Barnard, 18 Pick. 260 (29 Am. Dec. 580); Lockwood *v.* Crawford, 18 Conn. 361; Leavitt *v.* Putnam, 3 N. Y. 494 (53 Am. Dec. 322); Fell *v.* Dial, 14 S. C. 247; Beebe *v.* Brooks, 12 Cal. 308; Shelby *v.* Judd, 24 Kans. 161; Graul *v.* Strutzel, 53 Iowa, 712 (6 N. W. 119); Smith *v.* Caro, 9 Oreg. 278; Hart *v.* Eastman, 7 Minn. 74. See Picklar *v.* Harlan, 75 Mo. 678; Baker *v.* Robinson, 63 N. C. 191.

protest has been made and notices issued to drawer and indorsers, a subsequent transfer by indorsement would not require a second presentment, or issue of notice.[1] One notice to an indorsing firm and received by one partner binds all the partners, whether the default occurred before or after the dissolution of the partnership.[2] But if there are two or more independent joint indorsers, notice should be sent to each of them; notice to one does not even bind that one.[3]

The notice may, of course, be sent to the agent of a drawer or indorser, if such agent be fully authorized to receive such notices and bind his principal thereby.[4] If the party to be notified has made an assignment in bankruptcy or for the benefit of creditors, it is proper, although it is apparently doubtful whether it is necessary, for the notice to be sent to the assignee.[5]

If the drawer or indorser be dead, as long as the party notifying does not know of such death, the notice is good, if sent to the deceased party. If his death is known, but no personal representative has yet been appointed, the

[1] Libby *v.* Pierce, 47 N. H. 309; French *v.* Jarvis, 29 Conn. 347; St. John *v.* Roberts, 31 N. Y. 441 (88 Am. Dec. 287); Williams *v.* Matthews, 3 Cow. 252; Scott *v.* First N. Bk., 71 Ind. 445.

[2] Rhett *v.* Pole, 2 How. 457; Hubbard *v.* Matthews, 54 N. Y. 43, 50 (13 Am. Rep. 562); Slocum *v.* DeLizardi, 21 La. Ann. 355 (99 Am. Dec. 740); Fourth Nat. Bank *v.* Henschen, 52 Mo. 207; Hume *v.* Watt, 5 Kans. 34.

[3] Union Bk. *v.* Willis, 8 Met. 504, 512 (41 Am. Dec. 541); Shepard *v.* Hawley, 1 Conn. 367 (6 Am. Dec. 244); Hubbard *v.* Mathews, 54 N. Y. 43, 50 (13 Am. Rep. 562); Bk. of Chenango *v.* Root, 4 Cow. 126; Sayre *v.* Frick, 7 Watts *v.* S. 383 (62 Am. Dec. 249); Miser *v.* Trovinger, 7 Ohio St. 281; Seligman *v.* Gray, 66 Mich. 341 (33 N. W. 510); Boyd *v.* Orton, 16 Wis. 95.

[4] Fassin *v.* Hubbard, 55 N. Y. 465; Chouteau *v.* Webster, 6 Met. 1 (39 Am. Dec. 705); N. Y. & Ala. C. Co. *v.* Selma Sav. Bk., 51 Ala. 305 (23 Am. Rep. 552); Louisiana State Bank *v.* Ellery, 16 Mart. N. S. (La.) 87; Wilkins *v.* Commercial Bank, 6 How. (Miss.) 217; Wilson *v.* Senier, 14 Wis. 380. See Howard Bank *v.* Carson, 50 Md. 18.

[5] Rhode *v.* Proctor, 4 B. & C. 517; Am. Nat. Bank *v.* Junk &c. Mfg. Co., 94 Tenn. 624 (30 S. W. 753); Casco Nat. Bank *v.* Shaw, 79 Me. 376 (10 A. 67); Importers & Traders Bank *v.* Shaw, 144 Mass. 421 (11 N. E. 666)

notice should be sent within the usual time to the late residence of the deceased drawer or indorser, addressed to him, or to his "legal representative," and no further notice is required after the appointment of an executor or administrator.[1] It has been held that a notice, sent under such circumstances, addressed to "the estate" of the deceased party, would not be good, although there does not seem to be any satisfactory reason for that conclusion.[2] Nor will a notice, sent before the qualification of the personal representative, be good if it is addressed to one who is expected to, and does subsequently, qualify as such.[3]

If a personal representative has qualified, and his name and address are known, no other notice but one sent and addressed to him will be sufficient to bind the estate of the deceased drawer or indorser.[4]

§ 133. **The time allowed for giving notice.**—The notice should always be given after, and never before, the bill or note has been dishonored. And, at an earlier time, the law did not make any more specific requirement than that the notice should be given *within a reasonable time* after dishonor. It is now the rule that the holder has until the expiration of the next day in which to give notice, subject to certain modifications, necessary in the cases where the notices have to be sent away from the place of protest.

[1] Goodnow *v.* Warren, 122 Mass. 79, 82 (23 Am. Rep. 289); Dodson *v.* Taylor, 56 N. J. L. 11 (28 A. 316); Merchants' Bk. *v.* Birch, 17 Johns. 25 (8 Am. Dec. 367); Deininger *v.* Miller, 40 N. Y. S. 195; Weaver *v.* Penn, 27 La. Ann. 129; Pillow *v.* Hardeman, 3 Humph. 538 (39 Am. Dec. 195); Lindeman *v.* Guldin, 34 Pa. St. 54; Drexler *v.* McGlynn, 99 Cal. 143 (33 P. 773).

[2] Massachussets Bank *v.* Oliver, 10 Cush. 557. See *contra* Bk. of Port Jervis *v.* Darling, 91 Hun, 236.

[3] Mathewson *v.* Strafford Bk., 45 N. H. 104.

[4] Goodnow *v.* Warren, 122 Mass. 79 (23 Am. Rep. 289); Smalley *v.* Wright, 39 N. J. L. (11 Vroom) 471; Pillow *v.* Hardeman, 3 Humph. 538 (39 Am. Dec. 195); Barnes *v.* Reynolds, 4 How (Miss.) 114; Maspero *v.* Pedesclaux, 22 La. Ann. 227. Notice to one of two or more personal representatives will be sufficient. Bealls *v.* Peck, 12 Barb. 245; Louisiana State Bank *v.* Dumartrait, 4 La. Ann. 483; Carolina N. B. *v.* Wallace, 13 S. C. 347 (36 Am. Rep. 694).

If the drawer or indorser, who is entitled to notice, resides in the place of protest, and notice should be sent to his residence, it may be delivered at his residence at any time, before the customary hour for retirement, on the day succeeding the dishonor of the paper. But if the notice is to be left at his place of business, it should be served during business hours.[1] If the party to be notified resides in some other place, the notice may be sent by mail, and if there be more than one mail, the last mail of the following day will be early enough. If there be but one mail, it should be sent by that mail, unless it is made up at an unreasonable hour, when the holder may dispatch the notice by the mail of the second succeeding day. What is a reasonable hour depends upon the habits of the community.[2]

Each indorser has the same time after the receipt of the notice of dishonor, in which to notify the prior parties whom he wishes to hold liable. And if one party fails to issue his notice on the day following his receipt of the notice, the party so notified will be discharged of all liability, even though the excessive diligence of the holder or later indorser has enabled the indorser notified to receive the notice within the usual time after dishonor.[3]

[1] Garnett *v.* Woodcock, 6 Maule & S. 44; Cayuga Co. Bk. *v.* Hunt, 2 Hill, 635; Hallowell *v.* Curry, 41 Pa. St. 322; Bonner *v.* City of New Orleans, 2 Woods, 135; Adams *v.* Wright, 14 Wis. 442; Marks *v.* Boone, 24 Fla. 177 (4 So. 532).

[2] Martin *v.* Ingersoll, 8 Pick. 1; Haskell *v.* Boardman, 8 Allen, 38; U. S. Bk. *v.* Barker, 12 Wheat. 559; Bk. of Alexandria *v.* Swan, 9 Pet. 33; Smith *v.* Poillon, 87 N. Y. 590 (41 Am. Rep. 402); Nat. Bk. *v.* Bradley, 117 N. C. 526 (23 S. E. 455); Stephenson *v.* Dickson, 24 Pa. St. 148 (62 Am. Dec. 369); Marks *v.* Boone, 24 Fla. 177 (4 So. 532); West *v.* Brown, 6 Ohio St. 542; Downs *v.* Planters' Bk., 1 Smed. & M. 261 (40 Am. Dec. 92); Hartford Bk. *v.* Stedman, 3 Conn. 489; Chick *v.* Pillsbury, 24 Me. 458 (41 Am. Dec. 394). If there is no mail on the succeeding day, as might be the case in foreign mail by sea, the notice must be sent by the next regular mail ship. Lenox *v.* Leverett, 10 Mass. 1 (6 Am. Dec. 97); Stainback *v.* Bk. of Va., 11 Gratt. 260.

[3] Shelburne Falls N. B. *v.* Townsley, 102 Mass. 177 (3 Am. Rep. 445); Bartlett *v.* Hawley, 120 Mass. 92; West River Bank *v.* Taylor, 34 N. Y. 128; Seaton *v.* Scoville, 18 Kans. 433 (26 Am. Rep. 779); Manchester Bk. *v.* Fellows, 28 N. H. 302; Etting *v.* Schuylkill Bk., 2 Pa. St. 355 (44

If the succeeding day is a legal holiday, the notice may, but need not, be sent on that day; it may be delayed until the next business day following. And it has been held that, if an indorser receives notice on a legal holiday, since he is not obliged to open his mail on such a day, he has until the second day after the holiday in which to send out his notices.[1]

§ 134. **Manner of giving notice, when important.**— If the drawer or indorser, who is to be notified, actually receives the notice within the accustomed and required time, it is of no consequence how it was transmitted or communicated. The manner of giving notice becomes important only when the party notified did not receive the notice at all, or it did not reach him in due time.[2]

§ 135. **Manner of giving notice, where parties to be notified reside in the same place.**— Where parties to be notified reside in the place of presentment, it is now generally required that the notice should be served personally on them or on their representatives, whether the party notifying resides there or elsewhere. Under such circumstances, a notice sent by mail is insufficient.[3]

Am. Dec. 205); Corbin *v.* Planters' N. Bk., 87 Va. 661 (13 S. E. 98); Stix *v.* Mathews, 63 Mo. 371; Lawson *v.* Farmers' Bk., 10 Ohio St. 206; Rosson *v.* Carroll, 90 Tenn. 90 (16 S. W. 66).

[1] Wright *v.* Shawcross, 2 B. & Ald. 501; Haynes *v.* Birks, 3 Bos. & P. 599; Shepard *v.* Hall, 1 Conn. 329; Martin *v.* Ingersoll, 8 Pick. 1; Farmers' Bank of Bridgeport *v.* Vail, 21 N. Y. 485; Sylvester *v.* Crohan, 138 N. Y. 494 (34 N. E. 273); Friend *v.* Williamson, 9 Gratt. 31; Commercial Bank *v.* Barksdale, 36 Mo. 263; Deblieux *v.* Bullard, 1 Rob. 66 (36 Am. Dec. 684).

[2] Bank of United States *v.* Corcoran, 2 Pet. 121; Shelburne N. Bank *v.* Townsley, 102 Mass. 177 (3 Am. Rep. 445); Cayuga Co. Bk. *v.* Bennett, 5 Hill, 236; Dicken *v.* Hall, 87 Pa. St. 379; Cornett *v.* Hafer, 43 Kan. 60 (22 P. 1015); Carolina N. Bk. *v.* Wallace, 13 S. C. 347 (36 Am. Rep. 694); Moreland's Assignee *v.* Citizens' N. B. (Ky.), 30 S. W. 637; Gilchrist *v.* Donnell, 53 Mo. 591; Hendershot *v.* Neb. N. Bk., 25 Neb. 127 (41 N. W. 133).

[3] Williams *v.* Bank of U. S., 2 Pet. 96; Bowling *v.* Harrison, 6 How. (Miss.) 248; Peabody Ins. Co. *v.* Wilson, 29 W. Va. 528 (2 So. 888); Cabot Bk. *v.* Warner, 10 Allen, 522; Brown *v.* Bk. of Abingdon, 85 Va.

But this rule, which was once a universal requirement, now gives way, whenever a clearly established custom for notices to be sent by mail is proven.[1] And, wherever the postal authorities provide for the general delivery of mail by carriers at the places of business or residences of the persons to whom they are addressed, it is generally held that the mail is the proper medium for the transmission of notices of dishonor, for the obvious reason that delivery by letter carrier is just as much a personal service of the notice, as if it had been delivered by a special messenger. This ruling has been confirmed by statute in some of the States. But, in case of delivery of notices by mail in the same place, it must be deposited in the post office, early enough to be delivered on the day on which the party was entitled to receive notice.[2]

§ 136. **Personal notice, how and where served.**— Where personal notice of service is required, whether it is delivered by a special messenger or by a letter carrier, the notice must be sent to the place of business or residence of the party to be notified. And if the person cannot be found at one place, it is not necessary to seek him at the other, in order to deliver the notice to him in person. It may be left with the person found to be in charge of the place of business or residence; or if no one can be found, it would be sufficient to shove it under the door, or to put

95 (7 S. E. 357); Isbell *v.* Lewis, 98 Ala. 550 (13 So. 335); Vance *v.* Collins, 6 Cal. 435; Bank of Commerce *v.* Chambers, 14 Mo. App. 152; Swayze *v.* Britton, 17 Kan. 625; Thompson & Walkup Co. *v.* Appleby (Kan. App. '97), 48 P. 933.

[1] Bowling *v.* Harrison, 6 How. (Miss.) 248; Lime Rock Bank *v.* Hewett, 52 Me. 51; Chicopee Bk. *v.* Eager, 9 Met. 583; Grinman *v.* Walker, 9 Iowa, 426; Carolina N. B. *v.* Wallace, 13 S. C. 347 (36 Am. Rep. 694).

[2] Dobree *v.* Eastwood, 3 C. & P. 250; Eagle Bk. *v.* Hathaway, 5 Met. 212; Phelps *v.* Stocking, 21 Neb. 343; 32 N. W. 217 (good, if received the next day); Shoemaker *v.* Mechanics' Bk., 59 Pa. St. 79, 83 (98 Am. Dec. 315); Brennan *v.* Vogt, 97 Ala. 647 (11 So. 893); Walters *v.* Brown, 15 Md. 295 (74 Am. Dec. 566); Benedict *v.* Schmieg, 13 Wash. 476; 43 P. 374 (street address required in such cases).

it in the keyhole, or on a desk or table.[1] But, in order that a notice may be sufficient, when left at the party's place of business, it must be his permanent and general place of business, and not some temporary place of resort for the transaction of some special or particular business, or a place where he attends only to business of a non-financial character.[2]

If he has two permanent places of business in the same city, the notice may be sent to either, unless it is known that he attends to all his banking business at one particular place.[3]

And where one resides at a hotel or boarding house, that is his legal residence. But if the notice is not delivered to the party notified in person, it should be delivered to a clerk or the proprietor, or left in the room occupied by such party; although it seems that, in the case of a private boarding house, it will be sufficient, if left at the house with any person of years of discretion.[4]

In all these cases, the party to be notified should first be inquired for, before a delivery to any one else will constitute a sufficient notification.[5]

It is presumable that notice of dishonor may be served by telephone, but to be sufficient, one must be sure that the right party receives the communication.[6]

[1] Bk. of Columbia *v.* Lawrence, 1 Pet. 578; Hobbs *v.* Straine, 149 Mass. 212 (21 N. E. 365); Van Vechten *v.* Pruyn, 13 N. Y. 549; Nevins *v.* Bank of Lansingburgh, 10 Mich. 547; Isbell *v.* Lewis, 98 Ala. 550 (13 So. 335); Grinman *v.* Walker, 9 Iowa, 426; Sanderson *v.* Reinstadler, 31 Mo. 483; Fourth N. B. *v.* Altheimer, 91 Mo. 190 (3 S. W. 858); Stewart *v.* Eden, 2 Caines, 121 (2 Am. Dec. 222).

[2] Bk. of Columbia *v.* Lawrence, 1 Pet. 578; Bank of United States *v.* Corcoran, 2 Pet. 121; Lamkin *v.* Edgerly, 151 Mass. 348 (24 N. E. 49); Kleinman *v.* Boernstein, 32 Mo. 311; People *v.* N. R. Bk., 62 Hun, 484.

[3] Commercial Bk. of Albany *v.* Strong, 28 Vt. 316 (67 Am. Dec. 714); Phillips *v.* Alderson, 5 Humph. 402.

[4] Bank of United States *v.* Hatch, 6 Pet. 250; McMurtrie *v.* Jones, 3 Wash. C. C. 206; Howe *v.* Bradley, 19 Me. 31; Bank of West Tennessee *v.* Davis, 5 Heisk. 436; Ashley *v.* Gunton, 15 Ark. 415; Miles *v.* Hall, 12 Smed. & M. 332. See Bailey *v.* Bank of Missouri, 17 Mo. 467.

[5] Ashley *v.* Gunton, 15 Ark. 415.

[6] Thompson & Walkup Co. *v.* Appleby (Kan. App. '97), 48 P. 933.

§ 137. **Manner of serving notice on persons residing elsewhere.**— When the parties to be notified reside elsewhere than at the place of presentment or protest, or the residence of the party notifying, the law invariably permits service by mail. If the party notifying deposits the notice in the post office, properly addressed to the right party, the holder or other party sending the notice has done everything required of him, and he can hold the party so notified liable on the bill or note, even though the notice should be lost in the mail.[1] The notice will in such a case be insufficient if it can be proven that there had been a mistake in the address, due to the negligence of the party sending the notice.[2]

But the law does not absolutely require that notices be sent by mail in such cases. Other means of communication may be resorted to, the telephone, the telegraph, or a special messenger. But where such unusual means of communication are employed, to hold the drawer or indorser liable, the notice must be delivered within the time, that it would have been delivered, if it had been sent by mail.[3]

If the party to be notified does not reside in the same place where he transacts his business, it would seem proper and necessary for the notice to be mailed to him at his place of business, unless it is known that he receives

[1] Lindenberger *v.* Beall, 6 Wheat. 104; Shelburne Falls N. B. *v.* Townsley, 102 Mass. 177 (3 Am. Rep. 445); Swampscott Mach. Co. *v.* Rice, 159 Mass. 404 (34 N. E. 520); United States Nat. Bank *v.* Burton, 58 Vt. 426; Miller *v.* Hackley, 5 Johns. 375 (4 Am. Dec. 372); Wilson *v.* Richards, 22 Minn. 337. Deposit in a street letter-box is a deposit in the post office. Casco N. Bk. *v.* Shaw, 79 Me. 376 (10 A. 67); Wood *v.* Callaghan, 61 Mich. 402 (28 N. W. 162); Johnson *v.* Brown, 154 Mass. 105 (27 N. E. 994.) See *contra*, Townsend *v.* Auld, 31 N. Y. S. 29; 10 Misc. 343.

[2] Bacon *v.* Hanna, 137 N. Y. 379 (33 N. E. 303); Sylvester *v.* Crohan, 63 Hun, 509; *s. c.* 138 N. Y. 494 (34 N. E. 273); Hart *v.* McLellan, 80 Me. 95 (13 A. 272).

[3] Bk. of Columbia *v.* Lawrence, 1 Pet. 578; Van Vechten *v.* Pruyn, 13 N. Y. 549; Cassidy *v.* Creamer (Pa.), 13 A. 744; Dobree *v.* Eastwood, 3 C. & P. 250; Minehart *v.* Handlin, 37 Ark. 276; Jarvis *v.* St. Croix Mfg. Co., 23 Me. 287; Drexler *v.* McGlynn, 99 Cal. 143 (33 P. 773).

his mail at his residence; or unless he resides in the place where the bill or note is payable, and to be presented or protested. In these latter cases the notice should be sent to the residence.[1]

If there is no post office at the place, where the party to be notified has his residence, or transacts his business, the notice should be sent to the nearest post office, unless it is known that he customarily receives his mail at some other office, when it should be sent to him there.[2]

On the other hand, it is sufficient to address a notice generally to the city or town, in which the party resides or transacts his business, even though there be one or more branch post offices, or there is a postal delivery; unless it is known, that the party is in the habit of receiving his mail at a particular branch of the post-office, or what his street address is. If these facts are known, the party notifying should add these particulars to the address, in order to preserve the liability of the drawer or indorser notified.[3]

In all cases of transmission of notices by mail in the United States, the name of the State, as well as of the town, is required.[4]

Where the drawer or indorser gives a particular address, — as he has a right to do, and which he is presumed to have done, when he subscribes an address to his signature, — to which notices and other communications should be sent, no notice will be sufficient to charge him with

[1] Williams *v.* Bank of U. S., 2 Pet. 96; Montgomery Co. Bank *v.* Marsh, 7 N. Y. 481; Van Vechtan *v.* Pruyn, 13 N. Y. 549; Webber *v.* Gotthold, 28 N. Y. S. 763 (8 Misc. 503); Wolfe *v.* Jewett, 10 La. 383.

[2] Bk. of Columbia *v.* Lawrence, 1 Pt. 578; Spaulding *v.* Krutz, 1 Dill, C. C. 414; Bank of Geneva *v.* Howlett, 4 Wend. 328; Sanderson *v.* Reinstadler, 31 Mo. 483; Jones *v.* Lewis, 8 Watts. & S. 14. See Citizens N. Bk. *v.* Cade, 73 Mich. 449 (41 N. W. 500).

[3] Saco N. B. *v.* Sanborn, 63 Me. 340 (18 Am. Rep. 224); True *v.* Collins, 3 Allen, 438; Burlingame *v.* Foster, 128 Mass. 125; Morse *v.* Chamberlain, 144 Mass. 406 (11 N. E. 560); Downer *v.* Remer, 21 Wend. 10; *s. c.* 23 Wend. 620; Am. N. B. *v.* Junk, etc., Mfg. Co., 94 Tenn. 624 (30 S. W. 753).

[4] Beckwith *v.* Smith, 22 Me. 125 (38 Am. Dec. 290).

liability on the bill or note, if it is not sent to the given address.[1]

The holder has a right to presume that the address of the drawer or indorser has not been changed since the negotiation or transfer of the paper; but if he should know of such a change, he must send the notice to the new address, and a notice sent under such circumstances to the old address will not be sufficient.[2]

§ 138. **What is meant by "residing in the same place."**—The importance of determining whether one resides in the same place, arises only when the sufficiency of a notice by mail is inquired into. It does not depend so much upon the fact that the parties reside within or without the corporate limits of the same town, as whether they get their mail out of the same or different post-offices. If the parties get their mail out of different branches of the post office, as where there are branches of the post office in the same corporate city or town, the parties are held for the present purposes to reside in different places; and a notice of dishonor sent by mail will preserve the contingent liability of the drawer or indorser so notified.[3]

But if the parties resort to the same post office for their mail, it is held that for the purpose of sending notices of dishonor they must be considered as residing in the same place, even though the party to be notified resides outside of the corporate limits; and notice must be served personally, unless permitted by local custom or statute.[4] But

[1] Hodges *v.* Galt, 8 Pick. 251; Bartlett *v.* Robinson, 39 N. Y. 187; Dicken *v.* Hall, 87 Pa. St. 379; Paterson Bank *v.* Butler, 7 Halst. (11 N. J. L.) 268; Bk. of Columbia *v.* Magruder, 6 Har. & J. 172 (14 Am. Dec. 271); Carter *v.* Union Bk., 7 Humph. 548 (46 Am. Dec. 89); Peters *v.* Hobbs, 25 Ark. 67 (91 Am. Dec. 526); Tyson *v.* Oliver, 43 Ala. 455.

[2] Saco N. B. *v.* Sanborn, 63 Me. 340 (18 Am. Rep. 224); Requa *v.* Collins, 51 N. Y. 144; First N. B. *v.* Wood, 51 Vt. 473 (31 Am. Rep. 692); Knott *v.* Venable, 42 Ala. 186; Dunlap *v.* Thomson, 5 Yerg. 67; Davis *v.* Eppler, 38 Kan. 629 (16 P. 793).

[3] Shaylor *v.* Mix, 4 Allen, 351; Paton *v.* Lent, 4 Duer, 231; Gist *v.* Lybrand, 3 Ohio, 307 (17 Am. Dec. 595); Bell *v.* Hagerstown Bk., 7 Gill. 216.

[4] Shelburne Falls N. B. *v.* Townsley, 102 Mass. 177 (3 Am. Rep. 445);

still the authorities are not uniform. There are many cases, which hold that notice by mail will be sufficient where the party notified lives outside of the corporate limits of the place of presentment and protest, if there is no local post office and the party gets his mail through the post office at such place of protest. It seems that the right decision depends upon the degree of inconvenience in the employment of a special messenger to make personal service of the notice.[1]

§ 139. **Form and requisites of the notice of dishonor.** — Mere knowledge of dishonor does not take the place of, or amount to notice. Notice consists of the communication of the fact of dishonor by the person whose duty it is to give notice. Where, therefore, this communication has not been made by the proper party and in the proper way, as has been explained in the sections of this chapter, the drawer or indorser is discharged from all liability, even though he has learned in some other way of the fact of dishonor within the required time.[2]

But it is not necessary that the notice be written; it may be verbal. And it seems that the notice, when verbal, may be of the most informal and meager character, and yet be sufficient, unless the party notified asks for a more explicit notice, and the additional information is refused.[3]

Wherever, however, the notice is written, since the party

Ireland *v.* Kip, 10 Johns. 490; *s. c.* 11 Johns. 231; Brown *v.* Bk. of Abingdon, 85 Va. 95 (7 S. E. 357); Farmers', etc., Bank *v.* Battle, 4 Humph. 85; Forbes *v.* Omaha N. B., 10 Neb. 338 (6 N. W. 393).

[1] Bank of Columbia *v.* Lawrence, 1 Pet. 578; Bk. of U. S. *v.* Norwood, 1 Harr. & J. 423; Timms *v.* Delisle, 5 Blachf. 447; Barrett *v.* Evans, 28 Mo. 331; Newberry *v.* Trowbridge, 4 Mich. 391; *s. c.* 13 Mich. 263.

[2] Juniata Bk. *v.* Hale, 16 Serg. & R. 157 (16 Am. Dec. 558); Burgh *v.* Legge, 5 M. & W. 418; Bk. of Old Dominion *v.* McVeigh, 29 Gratt. 546; Lane *v.* Bank of West Tennessee, 9 Heisk. 419.

[3] Gilbert *v.* Dennis, 3 Met. 495; Metcalfe *v.* Richardson, 11 C. B. 1011; Cuyler *v.* Stevens, 4 Wend. 566; Hirschfelder *v.* Locey &c. Mfg. Co., 17 N. Y. S. 726; Glasgow *v.* Pratte, 8 Mo. 336 (40 Am. Dec. 142); Martin *v.* Brown, 75 Ala. 442; First N. Bk. *v.* Ryerson, 23 Iowa, 508; Pierce *v.* Schaden, 55 Cal. 406. See Citizens N. Bk. *v.* Cade, 73 Mich. 449 (41 N. W. 500).

notified has not the same opportunity to ask for additional information, as when the notice is verbal and personal; in order that the written notice may be sufficient, it must contain statements of every fact, which is necessary, in order to prove the liability of the party notified on the dishonored bill.

1. The notice must contain a description of the bill or note sufficient to enable the party notified to identify the paper, which has been dishonored. The description, when properly made, should give the date of the paper; should state by whom executed, payable to whom, for what amount, when due, by whom indorsed, and in the case of a bill, on whom it is drawn. And if it is payable at a particular place, the place of payment should be set forth. When these ordinary elements of a bill or note are accurately described in the notice, the holder or other party giving the notice has fully complied with the requirements of the law; and he does not lose his remedy against a drawer or indorser, because the description corresponds to and includes two or more bills or notes, having other unusual points of differentiation.[1]

But in order that the party notified may in any case take advantage of any defect or insufficiency of the description, and claim for that reason a discharge from liability on a bill or note, he must be able to show that he has been actually misled by the omissions or misstatements of the notice.[2]

2. The notice should also show that the paper has been

[1] Mills *v.* Bk. of U. S., 11 Wheat. 431; Legg *v.* Vinal, 165 Mass. 555 (43 N. E. 518); Gill *v.* Palmer, 29 Conn. 54; Hodges *v.* Schuler, 22 N. Y. 115; Dodson *v.* Taylor, 56 N. J. L. 11 (28 A. 316); Glicksman *v.* Earley, 78 Wis. 223 (47 N. W. 272); Brown *v.* Jones, 125 Ind. 375 (25 N. E. 452); Klochenbaum *v.* Pierson, 16 Cal. 375; Townsend *v.* Herr, 85 Mo. 503.

[2] Dennistoun *v.* Stewart, 17 How. 606; Bank of Alexandria *v.* Swan, 9 Pet. 33; King *v.* Hurley, 85 Me. 525 (27 A. 463); Smith *v.* Whiting, 12 Mass. 6 (7 Am. Dec. 25); Youngs *v.* Lee, 12 N. Y. 55; Gates *v.* Beecher, 60 N. Y. 518 (19 Am. Rep. 207); Gill *v.* Palmer, 29 Conn. 54; Howland *v.* Adrain, 29 N. J. L. (1 Vroom) 41; Tobey *v.* Lennig, 14 Pa. St. 483; Snow *v.* Perkins, 2 Mich. 238; Johnson *v.* Cocks, 7 Eng. (Ark.) 672; McCune *v.* Belt, 38 Mo. 281.

dishonored, *i. e.*, that it has been presented for payment, payment demanded, and refused. All these facts should be stated, in order to show a case of dishonor.[1]

But it has been held that, if the notice states that the bill or note has been "dishonored," or "protested," no further statement is required.[2]

3. It is held that the notice should also contain the statement that the holder or other party giving the notice looks for payment to the party notified.[3] But it is now very generally held that this is not necessary, inasmuch as the giving of notice is of itself sufficient intimation of the intentions in this respect of the party giving the notice.[4]

It has been held that there will be sufficient notification, if copies of the bill or note and of the protest are sent to the party to be notified.[5] On the other hand, it has been held that an unsigned notice is not sufficient.[6]

§ 140. **Allegation and proof of notice.** — In an action on a bill or note against a drawer or indorser, the burden is on the plaintiff to prove that the drawer or indorser has been duly notified. Where there has been personal service, the fact that the defendant has received the notice can in most cases be proven by the plaintiff. And so, also, is it

[1] Musson *v.* Lake, 4 How. 262; Clark *v* Eldridge, 13 Met. 96; Page *v.* Gilbert, 60 Me. 485; Salomon *v.* Pfeister, &c. Co. (N. J. L.), 31 A. 602. See Wallace *v.* Crilley, 46 Wis. 577. And see Cromer *v.* Platt, 37 Mich. 132 (26 Am. Rep. 503), where the rule of the text is held to be too severe.

[2] Hartley *v.* Case, 4 B. & C. 339; Mills *v.* Bk. of U. S., 11 Wheat. 431; Housatonic Bk. *v.* Laflin, 5 Cush. 546; Kilgore *v.* Buckley, 14 Conn. 362; Youngs *v.* Lee, 12 N. Y. 55; Stephenson *v.* Dickson, 24 Pa. St. 148 (62 Am. Dec. 362); Burkam *v.* Trowbridge, 9 Mich. 209; Reynolds *v.* Appleman, 41 Md. 615; Eastman *v.* Furman, 24 Cal. 379.

[3] See Davis *v.* Burt, 7 Iowa, 56; East *v.* Smith, 4 D. & L. 744; Solarte *v.* Palmer, 7 Bing. 530; *s. c.* 1 Bing. N. C. 194.

[4] Bk. of U. S. *v.* Carneal, 2 Pet. 542; Chard *v.* Fox, 14 Q. B. 200; Burgess *v.* Vreeland, 23 N. J. L. (4 Zab.) 71 (59 Am. Dec. 408); Clark *v.* Eldridge, 13 Met. 96; Cowles *v.* Harts, 3 Conn. 516; Graham *v.* Sangston, 1 Md. 59; Townsend *v.* Lorain Bk., 2 Ohio St. 345; Bk. of Cape Fear *v.* Seawell, 2 Hawks. 560.

[5] Nelson *v.* First N. B., 69 Fed. 798; 16 C. C. A. 425.

[6] People's N. Bk. *v.* Dibrell, 91 Tenn. 301 (18 S. W. 626).

possible for him to prove the receipt of notice, when sent by mail, where the defendant has made some acknowledgment of its receipt. But in the case of transmission of notices by mail, it is not necessary for the plaintiff to prove the actual receipt of the notice by the defendant. The plaintiff makes out a *prima facie* proof of the receipt of the notice, when he proves that a notice properly addressed to the defendant was deposited in the mail. He is not required to establish the fact that the notice has been received by the defendant.[1]

But where the indorser or drawer, who is sued, proves that he never receives the notice, it is sometimes held that evidence in support of the allegation of due notice must be more certain and specific as to the fact of proper mailing.[2]

ILLUSTRATIVE CASES.

Lamkin *v.* Edgerly, 151 Mass. 348 (24 N. E. 49).
City Nat. Bank of Dayton *v.* Clinton Co. Nat. Bank, 49 Ohio St. 351 (30 N. E 958).
Drexler *v.* McGlynn, 99 Cal. 143 (33 P. 773).

What Is a Sufficient Address in Sending Notice of Dishonor?

Lamkin *v.* Edgerly, 151 Mass. 348 (24 N. E. 49).

Exceptions from superior court, Suffolk county; Robert R. Bishop, Judge.

An action by Guy Lamkin against C. E. Edgerly and Edward N. Pickering to recover on a promissory note. The only issue was whether defendant Pickering, the first indorser on the note,

[1] Swampscott Mach. Co. *v.* Rice, 159 Mass. 404 (34 N. E. 520); Donegan *v.* Wood, 49 Ala. 242 (20 Am. Rep. 275); Gawtry *v.* Doane, 51 N. Y. 84; New Haven Co. Bk. *v.* Mitchell, 15 Conn. 206; Marks *v.* Boone, 24 Fla. 177 (4 So. 532); Walker *v.* Stetson, 14 Ohio St. 89 (84 Am. Dec. 362); Martin *v.* Smith (Mich.), 66 N. W. 61; Tobey *v.* Berley, 26 Ill. 426. As to the effect of statement in certificate of protest of service of notice, see *ante*, § 129.

[2] Townsend *v.* Auld, 31 N. Y. S. 19; 24 Civ. Proc. 181; Apple *v.* Lesser, 93 Ga. 749 (21 S. E. 171); Germ. Secur. Bk. *v.* McGarry, 106 Ala. 663 (17 So. 704); Manchester *v.* Van Brunt, 22 N. Y. S. 362.

received due notice of non-payment. The court found that he did, and he excepts to the finding. Pub. St. Mass. c. 77, § 16, provides that notice of non-payment of a promissorry note may be given to a party who is entitled to such notice by depositing in the post office addressed to the residence or "place of business" of such party.

Adams & Blinn, for plaintiff. C. S. Lincoln and C. P. Lincoln for defendant Pickering.

KNOWLTON, J. If the room to which the notice was directed was the place of business of the defendant Pickering on November 8, 1888, there can be no doubt that the notice was sufficient. Pub. St. c. 77, § 16; Hobbs *v.* Straine, 149 Mass. 212; 21 N. E. Rep. 365; Bank *v.* Fairbrother, 148 Mass. 181; 19 N. E. Rep. 345; Bank of America *v.* Shaw, 142 Mass. 290; N. E. Rep. 779; Importers' & Traders' Nat. Bank *v.* Shaw, 144 Mass. 421; 11 N. E. Rep. 666. The judge found that it was his place of business, and the question presented by the bill of exceptions is whether there was evidence to warrant the finding. The room was at No. 68 Devonshire street, Boston; and at that time the defendant's name was on the door-post at the street, and on the glass panel in the door of the room. An inquiry for him of a person in the room was answered by a statement that he was not in. The superintendent of the building testified that he was a tenant there the first part of November, 1888, and had been for a year or two, and that he remained there and had goods there until the 12th day of November or later, and paid rent for his office up to that date. The janitor of the building gave similar testimony, and said that he saw the defendant in his office twice in November of that year, and that his mail was left there, as usual, up to the 15th of November. Although there was other evidence which tended to show that he spent but little time there, the judge, on the whole, was warranted in finding that the room had not ceased to be his place of business when the notice was given, on November 8th. Exceptions overruled.

All Indorsers Need Not be Notified of Dishonor — Liability of Collecting Bank for Failure to Send Out Notices.

City Nat. Bank of Dayton *v.* Clinton Co. Nat. Bank, 49 Ohio St. 351 (30 N. E. 958).

(Syllabus by the court.)

Error to circuit court, Clinton county.

The plaintiff in error, the City National Bank of Dayton, on the 3d day of December, A. D. 1888, filed in the court of common pleas of Clinton county a petition, wherein, after averring the corporate character of the plaintiff and defendant, it sets forth as the grounds for the relief which it sought against the defendant in error, the Clinton County Bank, that in the due

course of its business it purchased, before due, of S. J. Patterson, the payee thereof, a certain promissory note, which was payable at the banking house of the defendant in error; that said S. J. Patterson indorsed the same; that after said purchase, and before the note became due, the plaintiff in error forwarded it to the defendant in error for collection; that defendant in error undertook to collect the same, or, if not collected, to take such steps as were necessary to fix the liability of the indorser; that the note was not paid when due; that the defendant in error did not protest the same so as to fix the liability of the indorser; that the makers were insolvent, and praying damages for the amount of the note with interest. The defendant in error answered the petition, denying that the note was purchased by the plaintiff in error in the due course of its business, but, on the contrary, alleging that the plaintiff in error was merely the agent of the indorser, S. J. Patterson, for its collection. It also set up as a defense: "That if, in fact, said plaintiff, in the due course of its business, did purchase from the payee, and become, before due, the owner and holder of said note, the said S. J. Patterson, as an indorser thereof, has not been released and discharged from his liability to the plaintiff as such indorser for the following reasons of fact: "First. This defendant duly presented to and made demand for payment of said note by the makers, Fulton & Peters, of all which said plaintiff and said indorser, S. J. Patterson, had due notice; and on said presentation and demand this defendant made arrangement for the payment of said note, and the same would have been paid but for the reasons hereinafter stated. Second. Said S. J. Patterson, after receiving notice that said note had been duly presented to said makers, Fulton & Peters, and demand of payment duly made by this defendant, assumed to and did extend the time of payment thereof for a fixed and definite time, to wit, to October 25, 1887. Said indorser, S. J. Patterson, thereby waived formal protest and notice by a notary public, all of which said plaintiff then well knew. Third. After the assignment of said makers, Fulton & Peters, the said indorser, S. J. Patterson, admitted to this defendant his liability on said note, and made no claim of release by reason of any negligence on the part of this defendant in not formally protesting said note by and through a notary public. This defendant denies that it has been guilty of any negligence whatever, and, on the contrary, avers that it used due diligence for the collection of said note, and that the same would have been collected but for the reasons hereinbefore stated." The affirmative matters of the answer were denied by the reply. The cause was tried to the court without the intervention of a jury, and a judgment rendered for the defendant in error. The evidence, and the rulings of the court in admitting and rejecting evidence, were embodied in a bill of exceptions. The cause was taken to the circuit court by the plaintiff in error, where the judgment of the court of common pleas was affirmed, whereupon pro-

ceedings were instituted in this court to obtain a reversal of both of said judgments. Reversed.

Gunckel & Rowe and Mills & Van Pelt, for plaintiff in error. Smith & Savage, for defendant in error.

BRADBURY, J. There is no conflict in the evidence relating to any material fact in this case. The petition avers that the plaintiff in error had purchased the note which is the subject of controversy between the parties hereto in due course of business before it became due. This, it is true, the answer of the defendant in error denies, but the cashier of the plaintiff in error, G. B. Harman, states directly and unequivocally in his deposition that his bank purchased the paper of the payee, S. J. Patterson, on August 20, 1888, five days after its date, at a discount of 7 per cent.; that the discount amounted to $5.07 — all which he says is shown by the books of the bank. Mr. Eichelberger, bookkeeper for Mr. Patterson, is equally explicit. No attempt is made, by the cross-examination or otherwise, to cast a suspicion upon or to discredit these two witnesses, or impeach the correctness of the books of the bank; nor is any evidence adduced that in the slightest degree contradicts their statements. Under these circumstances, it cannot be presumed, even to support the judgment rendered, that the court of common pleas found this evidence to be false, and totally disregarded it in making up its judgment.

The real contention between the parties was whether Patterson, the indorser of the promissory note, had been discharged from liability to the plaintiff in error by reason of the negligence of the defendant in error. The note had been transmitted to defendant in error for collection, and was not paid at maturity. If defendant in error, by its negligence, had discharged the indorser, then it should be held liable for the damages it thereby caused; but if, notwithstanding this alleged negligence, Patterson remained liable, it should be exonerated, for all the duty it owed to the plaintiff in error in case the note was not paid was to take such action as would charge the indorser. When the note matured, the defendant in error notified the makers, and one of them came to its banking house. A plain and simple duty then confronted the defendant in error,— either to require payment of the note, or, in default thereof, to take such action as, by the law merchant, was necessary to charge the indorser. It did neither. That the note was conditionally paid, is suggested. What that may mean in this connection is not clear. No doubt that, as between the holder and the maker of a promissory note, a conditional payment may be made; but the rules of the commercial law require a holder, who intends to hold an indorser liable, to give notice to the latter of the default of the maker. Anything less than a full and absolute payment is a default, for nothing less than that measures the duty of the maker. In this case, however, there was no conditional payment made. True, the defendant in error had in its hands the means of enforcing payment, but did nothing.

It simply accepted the maker's promise that, if Patterson did not give further time, they would pay the note. If the defendant in error had given notice to the plaintiff in error of the default of the maker, it would have discharged its duty, for it would have afforded the latter an opportunity to give notice to Patterson. Lawson *v.* Bank, 1 Ohio St. 206. It is true that the defendant in error could have passed by the plaintiff in error, and given notice of the maker's default directly to the indorser, Patterson, and thus fixed the latter's liability. This the defendant in error also failed to do. It is suggested that this failure was on account of ignorance of the residence or address of Patterson. If this was true, it constitutes no excuse for (1) the defendant in error, in that contingency, not being able to discharge its duty in any other way than by a notice to the plaintiff in error, was bound the more strongly to notify the latter; and (2) the means of knowledge were at hand. Fulton, one of the makers of the note, was at the bank, and announced his intention to write to Patterson to obtain an extension of the time of payment. It was apparent from the conversation that he had with the officers of defendant in error that he knew Patterson's address, and an inquiry of him would have enlightened those officers; but the inquiry was not made. The makers of the note, Fulton & Peters, in fact wrote to Patterson for an extension in the following terms: "Wilmington, O., October 19, 1887. Mr. S. J. Patterson, Dayton, O.— Dear Sir: We wish you would advise the Clinton County Bank to hold our note until November 5th, or, if you cannot do that, anyhow until the 25th inst. We cannot possibly meet it until at least that time; and oblige, yours, Fulton & Peters." This is the only notice that Patterson received.

Whether a notice of the non-payment of a promissory note, given by the maker to the indorser, is sufficient to fix the liability of the latter, has not been determined by this court. The authorities upon the question are in conflict. The cases of Johnson *v.* Harth, 1 Bailey, 482; Rosher *v.* Kieran, 4 Camp. 87; and Chitty on Bills, p. 495, note *u*, with some other authorities, seem to support the doctrine of the sufficiency of such notice, while the following cases deny it: Stanton *v.* Blossom, 14 Mass. 116; Tindal *v.* Brown, 1 Term R. 167, per Willes' opinion, 169, and Buller, J., 170; Stewart *v.* Kennett, 2 Camp. 177. Nor is the determination of this question necessary now, for, if a notice given by the maker to an indorser should be held sufficient to charge the latter, yet this letter of the maker is faulty in that it neither states that any demand of payment had been made, that the note had been forwarded to and was at the place of payment, or that it was due. If the court should go to the extent of holding that the indorser is bound to carry in his memory the due date of a note that he indorses, and must presume that its payment has been demanded at the proper time and place, all which is necessary to make this letter sufficient notice, was due diligence shown in giving the notice? The last day of

grace was October 17th, and the letter was not written until the 19th, two days later. To constitute due diligence it should have been deposited in the post office in time to have departed in the earliest mail to the residence of Patterson that departed after business hours on the 18th. Lawson *v.* Bank, 1 Ohio St. 206. It is true that, if the defendant in error had chosen to give notice of nonpayment to the plaintiff in error, the plaintiff in error would have had one day after it received notice within which to give notice to Patterson, and in that case a notice given to the plaintiff in error to Patterson on the 19th of October would have been in time. 1 Pars. Notes & B. 513; Lawson *v.* Bank, 1 Ohio St. 206. Where, however, a holder of a promissory note passes by an immediate indorser, and serves notice of nonpayment upon one more remote, he cannot avail himself of the time the immediate indorser would have had to serve the remote one, if the holder had given notice to the former, but the holder in that case must give notice to the remote indorser within the same time that he is required to give it to the immediate indorser. 1 Pars. Notes & B. 514; Dobree *v.* Eastwood, 3 Car. & P. 250; Simpson *v.* Turney, 5 Humph. 419; Rowe *v.* Tipper, 13 C. B. 249; Marsh *v.* Maxwell, 2 Camp. 210, note. Therefore, if the letter of Fulton & Peters had been sufficient in form and substance to fix the liability of Patterson, it was mailed too late, and for that reason he was discharged.

This release of Patterson was an accomplished fact before the makers of the note applied to him to extend the time of payment. The omission of the bank to require payment, or, in default thereof, to give the necessary notice to charge Patterson, was caused by the solicitations of the makers, Fulton & Peters. The most careful scrutiny of the records fails to disclose that Patterson, up to this time, said or did anything to mislead the bank, or to induce it to relax its vigilance, or to omit any step necessary in law to charge him as indorser. Patterson therefore had a perfect defense against any action to charge him as an indorser, unless, by his subsequent conduct, he has forfeited his right to set up this discharge. A subsequent promise to pay, when made with full knowledge of the facts, has been held to be evidence of a demand and notice, or to imply a previous waiver thereof. Myers *v.* Standart, 11 Ohio St. 29; Hibbard *v.* Russell, 16 N. H. 410; Robbins *v.* Pinckard, 5 Smedes & M. 51; Lewis *v.* Brehme, 33 Md. 412; McPhetres *v.* Halley's Ex'r, 32 Me. 72; Mense *v.* Osbern, 5 Mo. 544; Loose *v* Loose, 36 Pa. St. 538; Killby *v.* Rochussen, 18 C. B. (N. C.) 357. In the case under consideration, however, no promise to pay was made by Patterson, unless the following letter, written by him to Fulton & Peters in reply to theirs of the 19th of October, asking for an extension of the time of payment, can be construed into such promise: "Dayton, O., October 20, 1887. Messrs. Fulton & Peters, Wilmington, Ohio — Gentlemen: "Yours of 19th at hand, and we have instructed our bank (to

whom the note belongs, we having discounted same) to grant extension to October 25th. Please honor it at that time, and much oblige, yours truly, S. J. Patterson." If this letter should be construed to contain an implied promise to pay the note, yet, as it was written without any knowledge on the part of the writer that he had been discharged from liability, it does not fall within the principles upon which a subsequent promise to pay has been held to bind an indorser. Tebbetts *v.* Dowd, 23 Wend. 379.

Is Patterson estopped to set up his discharge by reason of his letter of the 20th of October, 1888, granting an extension to the makers of the note? On October 17, 1888, the day the note matured, one of the makers, Fulton, was called into the bank and his attention directed to it. The makers then had funds in the bank which could have been applied to its payment, but upon Mr. Fulton's representation that his firm was pressed for means it was induced to indulge them until they could apply to Patterson for a short extension of the time of payment, promising to pay it if Patterson refused to extend the time. After two days' delay they wrote the letter of October 19th, to which they received, in answer, Patterson's letter of the 20th, granting the favor, of which the bank was at once advised. It thereupon continued to receive and pay out for the makers large sums of money, until November 1, 1888, on which day the makers assigned their property in trust for their creditors, having assets sufficient to pay only a few cents on the dollar of their indebtedness. No doubt, but for this letter of Patterson's, the bank would have charged this note against the makers' deposits, and in that way secured its payment. If Patterson had been informed of these facts, and chose to grant an extension to the makers, and the bank, relying thereon, had paid out all the funds of the makers before the assignment was made, and thus lost its means of indemnity, he should be held to abide the consequences. But he had no such knowledge. He neither knew that he had been discharged by the bank's neglect, nor that the bank had indemnity within its control. His granting the extension was an innocent act in itself, and he should not be charged with consequences that he had no reason to suspect would flow from it. On the contrary, the bank, defendant in error, was an actor in the entire transaction. With means of payment in its hands, it chose to indulge the makers in direct violation of its duty to the plaintiff in error. It knew this indulgence was granted to the makers of the note expressly to enable them to apply for an extension of payment to one who, upon the face of the paper, was only liable in case it did the very duty that it must of necessity violate to grant the indulgence; and when the letter from Patterson was made known to it, and it proceeded to act upon the extension granted, it had no reason to believe that he had granted the extension with knowledge of the facts, and it took no action to advise him of their existence. Under these circumstances, the defendant in error must be held

to have assumed the risks that naturally flowed from its actions, one of which was that Patterson might avail himself of a defense thus afforded to him by its own negligence. As upon the undisputed facts the judgment should have been for the plaintiff in error, it becomes unnecessary to consider the other questions that arise upon the record.

Judgment reversed, and cause remanded for further proceedings.

Notice of Dishonor Must be Addressed to Executor or Administrator of Deceased Indorser.

Drexler *v.* McGlynn, 90 Cal. 143 (33 P. 773).

PATTERSON, J. This is an action against the defendants, as executors of the last will and testament of James M. Donahue, deceased, upon a promissory note indorsed by their testator September 10, 1889. The note became due March 10, 1890. Donahue died on the 3d day of March, 1890, leaving a will in which the defendants were named as executors, and which was filed in the superior court on the 11th day of March, 1890.

It is claimed that the estate is not liable because no proper notice of protest was given, but we think the point is not well taken. The notice was addressed to "Messrs. Peter J. McGlynn and J. F. Burgin, Jr., administrators of the estate of J. M. Donahue, deceased," and it was deposited in the post office on the day the note became due. The Civil Court provides that a notice of dishonor may be given, in case of the death of the party otherwise entitled to notice, to one of his personal representatives, or, if there are none, then to any member of his family, and, if there be no family, it must be mailed to his last place of residence. Section 3145. Appellants contend that, inasmuch as the defendants had not been appointed by the court at the time the notice was given, they were not personal representatives, within the meaning of this statute; and cases are cited, holding that notice sent to a person afterwards appointed administrator of an intestate is insufficient. These authorities are not in point. While it is true that the appointment of an executor is only provisional, and requires the approval of the court, for the purpose of administration upon the estate of the testator, it is also true that the law allows a man to appoint his executors, subject to this approval, and treats them as entitled to the office until they renounce it; and unless, for some reason, they are incompetent, the appointment makes them representatives of the estate, "so far as relates to acts in which they are merely passive, such as receiving notice of the dishonor of a note" Shoenberger's Ex'rs *v.* Savings Inst., 28 Pa. St. 466. It matters not that the person named in the will may never be actually appointed executor by the court. He may renounce the trust. But, as he is the person to whom the testator has confided the

administration of his estate, it is regarded as safe to intrust him with the notice. "It is not to be expected that any person can ordinarily be found upon whom this duty [protecting the estate] will rest more strongly than upon one who is named as executor in the will." Goodnow *v.* Warren, 122 Mass. 82; 3 Rand. Com. Paper, § 1245. The reason for holding that a notice to one named in the will as executor is good, is not applicable to the case of one who happens after the notice is given to be appointed administrator, because the latter is neither honorably, nor in legal duty, bound to do anything for the protection of the estate.

It is claimed, also, that the note was not presented for payment by the holder; that the evidence shows that the note was transferred to the Anglo-Californian Bank, which was the holder of the note at the time demand was made. The certificate of the notary, it is true, states the note was presented, and payment was demanded, "at the request of the Anglo-Californian Bank, Ld., holder of the original note," but the plaintiff testified that he had been the owner of the note from the time it was made until the day of his trial, and the fair import of the evidence is that the note was given to the bank simply for collection. The notice may properly be given by an agent, and the agent may give the notice in his own name. 3 Rand. Com. Paper, §§ 1236, 1237; 2 Daniel Neg. Inst., § 991.

There is nothing in the point that the notice was invalid because it was addressed to the defendants as "administrator." The notice need not have been addressed to them in their representative character at all. The actual receipt of the notice is the material thing. Beals *v.* Peck, 12 Barb. 245. If the defendants actually received the notice,— and such is the presumption from the fact of mailing, properly addressed and postage prepaid, — the object of the law has been attained.

We think the court properly overruled the demurrer. The allegation as to protest might have been more specific in its statement of facts, but, as against a general demurrer, it is good. Judgment and order affirmed.

We concur: Harrison, J.; Garoutte, J.

CHAPTER XIII.

EXCUSES FOR FAILURE OF PRESENTMENT, PROTEST AND NOTICE.

SECTION 141. War, political and social disturbances, pestilence, epidemics, conflagrations, floods, etc.

142. Drawing with no right to expect acceptance or payment.

143. Void note.

144. Ignorance of and failure to discover the address of parties.

145. Sickness, death or accident to holder or to paper.

146. Possession of security by drawer or indorser.

147. Waiver of presentment, protest and notice.

148. No damage to holder — Loss or destruction of the instrument.

§ 141. **War, political and social disturbances, pestilence, epidemics, conflagrations, floods, etc.** — Notwithstanding the fact, that in the law of Commercial Paper the requirement of presentment, protest and notice is vigorously enforced; still impossibilities are not required. When circumstances make it an impossibility for the holder of a bill or note to make presentment and protest, and to send out notices of dishonor, or to do either of these things, at the required time; he will be excused for the delay or non-performance of these conditions, and nevertheless hold the drawer and indorsers liable.

A variety of occurrences of a public character may be mentioned as illustration, which so block the wheels of commerce, that it becomes impossible to perform these commercial duties. Thus, the breaking out of war between the countries, in which the parties to a bill or note reside, is a good excuse, as long as hostilities continue, for want of presentment, protest or notice, because all intercourse between the citizens of belligerent nations is then strictly interdicted by the law of war.[1]

[1] Scholefield *v.* Eichelberger, 7 Pet. 586; Ray *v.* Smith, 17 Wall. 411; Hubbard *v.* Matthews, 54 N. Y. 43 (13 Am. Rep. 562); House *v.* Adams, 48 Pa. St. 261 (86 Am. Dec. 588); Bynum *v.* Apperson, 9 Heisk. 632;

The parties to commercial paper will also be excused from performing these conditions, if a riot or other public disturbance forces a complete cessation of business on the day of maturity of a bill or note.[1] Want of presentment, protest and notice, or either of them, is excused also, where business is completely suspended on account of the prevalence of an epidemic or other disease, by the occurrence of a flood or conflagration. But in all these cases, the suspension of business must be complete and made absolutely necessary by the public calamity or disturbance.[2]

But whenever the impediment to the performance of these duties is removed, it is the duty of the holder to make presentment and protest, and to issue notices of dishonor, in order to preserve the liability of drawer and indorsers. He has a reasonable time after the removal of the cause of delay, in which to do these things.[3]

§ 142. **Drawing with no right to expect acceptance or payment.**— If one draws on another, without having any reasonable ground to expect that the bill will be honored, the drawer cannot require presentment and notice.[4]

Farmer's Bk. *v.* Gunnell, 26 Gratt. 131; McVeigh *v.* Bk. of Old Dominion, 26 Gratt. 785; Norris *v.* Despard, 38 Md. 487; Peters *v.* Hobbs, 25 Ark. 67; Durden *v.* Smith, 44 Miss. 549. And the same rule is followed, where a part of the country is occupied by the military forces of the enemy, preventing communication between parties residing in the different sections of the same country. Apperson *v.* Bynum, 5 Coldw. 341; Polk *v.* Spinks, 5 Cold. 431 (98 Am. Dec. 426).

[1] See Apperson *v.* Union Bk., 4 Cold. 446; Patience *v.* Townley, 2 Smith, 223; Purcell *v.* Allemong, 12 Gratt. 739.

[2] Tunno *v.* Lague, 2 Johns. 1 (1 Am. Dec. 14).

[3] See cases cited in preceding notes and Bond *v.* Moore, 93 U. S. 593; House *v.* Adams, 48 Pa. St. 261 (86 Am. Dec. 588); Gilroy *v.* Brinkley, 12 Heisk. 392; Labadiole *v.* Landry, 20 La. Ann. 149.

[4] Lawrence *v.* Hammond, 4 App. Dec. (D. C.) 467; Kinsley *v.* Robinson, 21 Pick. 327; Thompson *v.* Stewart, 3 Conn. 171 (8 Am. Dec. 168); Dollfus *v.* Frosch, 5 Hill, 493 (40 Am. Dec. 368); Kimball *v.* Bryan, 56 Iowa, 632 (10 N. W. 218); Adams *v.* Darby, 28 Mo. 162 (75 Am. Dec. 115); Brower *v.* Ruppert, 24 Ill. 182; Cashman *v.* Harrison, 90 Cal. 297 (27 P. 283); Avent *v.* Maroney (Miss.), 12 So. 209; Manning *v.* Maroney, 87 Ala. 563; 6 So. 343 (where the drawer had instructed drawee not to accept). But see Cruger *v.* Armstrong, 3 Johns. 5 (2 Am. Dec. 126).

But this fact would only excuse want of presentment, protest and notice as to the drawer; the indorsers would nevertheless be discharged, if these duties to secondary obligors were neglected or delayed, unless the indorsers knew when they indorsed the paper, that the drawer's relations with the drawee did not justify the expectation that the bill would be accepted. In the latter case, the indorsers as well as the drawers would be held bound on their indorsement, notwithstanding the want of presentment, protest and notice.[1]

But the mere fact, that the drawee is not at the time absolutely indebted to the drawer, is no ground for holding that the drawer had no right to expect acceptance of his bill. In each case it is a question of fact, whether in view of the business relations of the drawer and drawee an acceptance of the bill could be reasonably expected.[2]

It would seem that if the drawee has accepted the bill, the drawer had a right to expect him to pay it, when it is presented. But it has been held, that even in that case, the relations of the drawer and drawee may be such that the former has no reasonable grounds for expecting payment, as in the case of accommodation acceptances; and hence he may be held liable although the holder fails to make presentment for payment, or to send the drawer notice of dishonor.[3] And, for the same reason, the in-

[1] French *v.* Bk. of Columbia, 4 Cranch, 141; Mohawk Bank *v.* Broderick, 10 Wend. 304; *s. c.* 13 Wend. 133 (27 Am. Dec. 192); Scarborough *v.* Harris, 1 Bay, 177 (1 Am. Dec. 609); Warden *v.* Tucker, 7 Mass. 449 (5 Am. Dec. 62); Bogy *v.* Keil, 1 Mo. 743.

[2] Dickens *v.* Beal, 10 Pet. 572; Knickerboker L. Ins. Co. *v.* Pendleton, 112 U. S. 696; Stanton *v.* Blossom, 14 Mass. 116 (7 Am. Dec. 198); Robinson *v.* Ames, 20 Johns. 146 (11 Am. Dec. 259); Orear *v.* McDonald, 9 Gill. 350 (53 Am. Dec. 703); Schuchardt *v.* Hall, 36 Md. 600 (11 Am. Rep. 514); Adams *v.* Darby, 28 Mo. 162 (75 Am. Dec. 115); Welch *v.* Taylor Mfg. Co., 82 Ill. 579; Miser *v.* Trovinger, 7 Ohio St. 281; Compton *v.* Blair, 46 Mich. 1; Leonard *v.* Olson (Iowa, '96), 68 N. W. 677.

[3] Kinsley *v.* Robinson, 21 Pick. 327; Barbaroud *v.* Waters, 3 Met. (Ky.) 304; Allen *v.* King, 4 McLean, 128; Hoffman *v.* Smith, 1 Caines, 157; Ross *v.* Bydell, 5 Duer, 462; Compton *v.* Blair, 46 Mich. 1 (drawer had instructed acceptor not to pay the bill); Harrison *v.* Trader, 29 Ark. 85; Beveridge *v.* Richmond, 14 Mo. App. 405. But he is entitled to

dorser cannot require presentment, protest and notice, where the bill or note is issued for his accommodation, under an agreement or understanding that he will provide for payment on the day of maturity.[1] The same is also the rule, where the drawer or indorser has been provided by the acceptor or maker with funds to enable him to take up the paper at maturity.[2]

There is, also, no right to demand presentment, protest, and notice, where the drawer and drawee are the same natural persons, as well as in the case of co-partnership and corporations.[3]

§ 143. **Void note.** — When a note is void for any reason, as between the maker and payee, and the indorser knew it when the indorsement was made; the indorser cannot require presentment, protest and notice. He guarantees the validity of a note, which he cannot expect to see honored by the makers.[4]

§ 144. **Ignorance of and failure to discover, the address of parties.** — The failure to make presentment

notice and presentment, if he had reasonable ground for expecting payment. Norton *v.* Pickering, 8 B. & C. 610; Miser *v.* Trovinger, 7 Ohio St. 281; Lacoste *v.* Harper, 3 La. Ann. 385 (48 Am. Dec. 449).

[1] Letson *v.* Dunham, 2 Gr. (13 N. J. L.) 307; Torrey *v.* Foss, 40 Me. 74; Shriner *v.* Keller, 25 Pa. St. 61; Black *v.* Fizer, 10 Heisk. 48.

[2] Ray *v.* Smith, 17 Wall. 411; Wright *v.* Anderson, 70 Me. 86; Curtis *v.* Martin, 20 Ill. 557.

[3] Fairchild *v.* Ogdenburg R. R. Co., 15 N. Y. 357 (69 Am. Dec. 606); Fuller *v.* Hooper, 3 Gray, 334; Bailey *v.* Southwestern Bk., 11 Fla. 266; Rhett *v.* Pole, 2 How. 457; Dwight *v.* Scovill, 2 Conn. 654; Maux Ferry Co. *v.* Branegan, 40 Ind. 361; New York &c. Co. *v.* Myer, 51 Ala. 325. The same rule obtains where the maker of a note, or acceptor of a bill, and an indorser are the same person. Foland *v.* Boyd, 23 Pa. St. 470; West Branch Bank *v.* Fulmer, 3 Pa. St. 399 (40 Am. Dec. 651); Donnell *v.* Lewis Co. Sav. Bk., 80 Mo. 165; Castle *v.* Rickly, 44 Ohio St. 490 (9 N. E. 136). See *ante*, § 46.

[4] Copp *v.* M'Dugall, 9 Mass. 1; Wyman *v.* Adams, 12 Cush. 210; Turnbull *v.* Bowyer, 40 N. Y. 456 (100 Am. Dec. 523); Susquehanna Val. Bk. *v.* Loomis, 85 N. Y. 207 (39 Am. Rep. 652); Perkins *v.* White, 36 Ohio St. 530; Butler *v.* Slocomb, 33 La. Ann. 170 (39 Am. Rep. 265). In this case the defense was incapacity of maker on account of infancy.

and to give notice will be excused, when the holder or other party, whose duty it is to do any of these things, cannot after the exercise of due diligence find out the parties to whom presentment should be made or notice sent. If he cannot find the maker of a note or acceptor of a bill, presentment for payment or acceptance will be excused; but the paper must be protested, and notice sent to the drawer and indorsers. If the drawer or one of the indorsers cannot be found, this fact will excuse notice to that particular drawer or indorser, but not presentment and protest.[1] But as soon as the address of the party is discovered, the presentment must be made, or the notice sent, as the case may be.[2] But in the case, where the maker of a note or acceptor of a bill has changed his abode or place of business; whether it will be necessary to make presentment to him at his new address, on discovering it, will depend upon whether it is in the same State or country, or in a different one. If he has moved to another State or country, the holder is not required to make presentment; but he may protest at once for non-payment or non-acceptance, stating the fact that presentment became impossible by the departure of the maker or acceptor from the State or country. And for these purposes, the States of the American Union are considered as foreign to each other.[3]

[1] May *v.* Coffin, 4 Mass. 341; Manufacturer's Bank *v.* Hazard, 35 N. Y. 226; Isbell *v.* Lewis, 98 Ala. 560 (13 So. 335); Walker *v.* Stetson, 14 Ohio St. 89 (84 Am. Dec. 362); Garver *v.* Downie, 33 Cal. 176; Davis *v.* Eppler, 38 Kan. 629 (16 P. 793).

[2] Baldwin *v.* Richardson, 1 B. & C. 245; Hutchison *v.* Crutcher (Tenn. '97), 39 S. W. 725; McGeorge *v.* Chapman, 44 N. J. L. (16 Vroom) 395; Beale *v.* Parish, 20 N. Y. 407 (75 Am. Dec. 414), and cases cited in preceding note.

[3] McGruder *v.* Bk. of Washington, 9 Wheat. 598; Grafton Bk. *v.* Cox, 13 Gray, 503; Sulzbacker *v.* Bk. of Charleston, 2 Pickle, 201 (6 S. W. 129); Adams *v.* Leland, 30 N. Y. 399; Smith *v.* Poillon, 87 N. Y. 590 (41 Am. Rep. 402); Reid *v.* Morrison, 2 Watts and S. 401; Leonard *v.* Olson (Iowa, '96), 68 N. W. 677; Eaton *v.* McMahon, 42 Wis. 484; Salisbury *v.* Bartleson, 39 Minn. 365 (40 N. W. 265); Herrick *v.* Baldwin, 17 Minn. 209 (10 Am. Rep. 161). But see Farwell *v.* St. Paul Trust Co., 45 Minn. 495 (48 N. W. 326).

Temporary absence does not, however, excuse failure to present for payment.[1]

If the maker or acceptor is notoriously insolvent and has absconded, or has been committed to the penitentiary, it is not necessary to make presentment anywhere, not even at his former residence or place of business. But insolvency alone does not excuse presentment.[2]

In determining what amount of diligence must be exercised in searching after the desired address of a party to a bill or note, nothing more definite can be stated without going into the details of particular cases, than that it is that degree of diligence which may be expected of a reasonably prudent man under the special circumstances of the particular case. And it has been held that where the inquiry leads to a reliable person, who professes to know the desired address, the inquiry need not be pursued any further, and the party will nevertheless be held bound on the paper although the information proves to be erroneous.[3]

But until some such definite information is received, inquiry must be made of every other party to the paper, and of everyone else, who is likely to know the address which is being sought after.[4]

[1] Glaser *v.* Rounds, 16 R. I. 235 (14 A. 863).

[2] Hale *v.* Burr, 12 Mass. 89; Schofield *v.* Bayard, 3 Wend. 488; Taylor *v.* Snyder, 3 Den. 145 (45 Am. Dec. 457); Lehman *v.* Jones, 1 Watts & S. 126 (37 Am. Dec. 455); Cedar Falls Co. *v.* Wallace, 83 N. C. 225; Ratcliffe *v.* Planters' Bk., 2 Sneed, 425; First Nat. Bk. *v.* De Morse (Tex. Civ. App.), 26 S. W. 417 (maker in the penitentiary); Leonard *v.* Olson (Iowa, '96), 68 N. W. 677; Warrensburg &c. Assn. *v.* Zoll, 84 Mo. 94. See *contra* Farwell *v.* St. Paul Trust Co., 45 Minn. 495 (48 N. W. 326).

[3] Harris *v.* Robinson, 4 How. 336; Brighton &c. Bank *v.* Philbrick, 40 N. H. 506; Gawtry *v.* Doane, 51 N. Y. 84; Belden *v.* Lamb, 17 Conn. 441; Central N. Bk. *v.* Adams, 11 S. C. 452 (32 Am. Rep. 495).

[4] Lambert *v.* Ghiselin, 9 How. 552; Sweet *v.* Woodin, 72 Mich. 393 (40 N. W. 471); Grafton Bk. *v.* Cox, 13 Gray, 503; Davis *v.* Eppler, 38 Kan. 629 (16 P. 793); Lawrence *v.* Miller, 16 N. Y. 238; Requa *v.* Collins, 51 N. Y. 144; Hoffman *v.* Hollingsworth (Ind. App.), 37 N. E. 960; Isbell *v.* Lewis, 98 Ala. 550 (13 So. 335); Gilchrist *v.* Donnell, 53 Mo. 591; Haber *v.* Brown, 101 Cal. 445 (35 P. 1035).

§ 145. **Sickness, death or accident to holder or to paper — Delay in transmission by mail.**— The sickness or death of the holder, or the happening of some accident or injury to him, on the eve of the maturity of the paper, and so unexpected that provision could not be reasonably made for the presentment, protest and notice by another, have been held to be good excuses for the failure to do these things at the required time. But they do not excuse the complete failure to do them, after the emergency has passed, and sufficient time has elapsed for the appointment of another to act for the holder.[1] The same excuses would be sufficient, if the accident or sickness happened to the agent of the holder, or to an indorser, who was expecting to give notices of dishonor to the drawer and prior indorsers.

If a bill or note is transmitted by mail, whether it be to an agent for collection, or to some indorsee in full, and it should be lost or delayed in the mail, so that presentment could not be made on the day of maturity, the delay in presentment, protest and notice, thereby occasioned, will be excused.[2]

And so, also, where the failure to receive the paper in time to make presentment in due season is occasioned by the immediate indorser, the delay in presentment, protest and notice will not discharge him; although, it seems, it will discharge the drawer and prior indorsees, who did not occasion the delay.[3]

§ 146. **Possession of security by drawer or indorser.**— A difficult question, and about which the authorities are contradictory, is how far will the possession of security or

[1] White *v.* Stoddard, 11 Gray, 258 (71 Am. Dec. 711); Aymar *v.* Beers, 7 Cow. 705 (17 Am. Dec. 538). In the case of death of the holder, delay in presentment, protest and notice is excusable, until the executor or administrator has qualified. See *ante*, §§ 115, 113.

[2] Windham Bank *v.* Norton, 22 Conn. 213 (56 Am. Dec. 397); Jones *v.* Wardell, 6 Watts & S. 399; Pier *v.* Heinrichshoffen, 67 Mo. 163 (29 Am. Rep. 501); Newbold *v.* Boraef, 155 Pa. St. 227 (26 A. 305).

[3] Mason *v.* Pritchard, 9 Heisk. 793.

of the property of the primary obligor by the drawer or an indorser, permit the holder to dispense with presentment, protest and notice, as to such drawer or indorser. Probably all the cases would support the proposition, that while mere possession of collaterals to secure the payment of the instrument will not excuse presentment and notice, such a drawer or indorser could not require these things, if the acceptor or maker has made an assignment of all his property; since there would be nothing left in the hands of such acceptor or maker, wherewith to make payment of the bill or note in question.[1]

§ 147. **Waiver of presentment, protest and notice.**— The requirement of presentment, protest and notice is for the benefit of the persons secondarily liable; and if they see fit to do so, they, or any one of them, may by agreement, express or implied, waive the requirement, and bind themselves, in spite of the omission of these customary acts. The waiver can be made only by one who is secondarily liable on a bill or note, or by his duly authorized agent,[2]

[1] Kramer *v.* Sandford, 4 Watts & S. 328 (39 Am. Dec. 92); Creamer *v.* Perry, 17 Pick. 332 (27 Am. Dec. 297); Seacord *v.* Miller, 13 N. Y. 55; Whittier *v.* Collins, 15 R. I. 44 (23 A. 39); Wright *v.* Andrews, 70 Me. 86; Moses *v.* Ela, 43 N. H. 557 (82 Am. Dec. 175); May *v.* Boisseau, 8 Leigh, 164; Swan *v.* Hodges, 3 Head, 251; Wilson *v.* Senier, 14 Wis. 380; Ray *v.* Smith, 17 Wall. 416. Where the acceptor or maker has made an assignment for the benefit of creditors, presentment must be made to such assignee; *ante*, § 117.

But some of the cases maintain that presentment, protest and notice may be omitted, whenever the drawer or indorser has property of the primary obligor, which fully secures him from his secondary liability on the bill or note, whether it constitutes the whole or only a part of the property of the acceptor or maker. Marshall *v.* Mitchell, 35 Me. 221 (58 Am. Dec. 697); Second N. Bk. *v.* McGuire, 33 Ohio St. 295 (31 Am. Rep. 539); Durham *v.* Price, 5 Yerg. 300 (26 Am. Dec. 267); Smith *v.* Lownsdale, 6 Ore. 78.

[2] Standage *v.* Creighton, 5 C. & P. 406; Central Bank *v.* Davis, 19 Pick. 373; Manney *v.* Coit, 80 N. C. 300; Seldner *v.* Mt. Jackson Nat. Bk., 66 Md. 488 (8 A. 262) waiver made by a member of firm); Bryant *v.* Lord, 19 Minn, 397; Star Wagon Co. *v.* Sweezey, 52 Iowa, 394 (3 N. W. 421); Farmer's Bank *v.* Ewing, 78 Ky. 264 (39 Am. Rep. 231).

and it must be made to the holder of the bill or note. But if it is made to the holder, the waiver will inure to the benefit of any subsequent indorsee or transferee.[1]

If the waiver is made by the drawer of a bill, and it is put in the body of the instrument, it constitutes a part of the contract of every one who becomes secondarily liable thereon, whether as drawer or indorser.[2] But if it appears over the signature of one of the indorsers, it will bind him only, and not any other prior or subsequent indorser.[3]

The waiver may be written on the bill or note, or on a separate paper;[4] and while it is doubtful, whether a parol waiver is binding on the party making it, there being authorities for[5] and against[6] the proposition; it is not necessary that the waiver should be couched in words of express agreement. The waiver will, for example, be inferred from the use of words by an indorser, which show his in-

[1] Miller *v.* Hackley, 5 Johns. 375 (4 Am. Dec. 372); National Bank *v.* Lewis, 50 Vt. 622 (28 Am. Rep. 514); Curtiss *v.* Martin, 20 Ill. 557; Olendorf *v.* Swatz, 5 Cal. 480 (63 Am. Dec. 141).

[2] Hoover *v.* McCormick, 84 Wis. 215 (54 N. W. 505); Farmers' Bank *v.* Ewing, 78 Ky. 266 (39 Am. Rep. 231); Deering *v.* Wiley, 56 Ill. App. 309; Lowry *v.* Steele, 27 Ind. 168; Leeds *v.* Hamilton Paint &c. Co. (Tex. Civ. App.), 35 S. W. 77; Iowa Val. State Bk. *v.* Sigstad (Iowa), 65 N. W. 407; Phillips *v.* Dippo (Iowa), 61 N. W. 216.

[3] Woodman *v.* Thurston, 8 Cush 157; Johnson *v.* Parsons, 140 Mass. 173 (4 N. E. 196); Stanley *v.* McElrath, 86 Cal. 449 (25 P. 16); Cooke *v.* Pomeroy, 65 Conn. 466 (32 A. 935); Hatley *v.* Jackson, 48 Md. 254; McMonigal *v.* Brown, 45 Ohio St. 499 (15 N. E. 860); May *v.* Boisseau, 8 Leigh, 164; Quintance *v.* Goodrow, 16 Mont. 376; Mehagan *v.* McManus, 35 Neb. 633 (53 N. W. 574). But see *contra* Parshley *v.* Heath, 69 Me. 90 (31 Am. Rep. 246).

[4] Riker *v.* Sprague Mfg. Co., 14 R. I. 402 (51 Am. Rep. 413); Spencer *v.* Harvey, 17 Wend 489; Duvall *v.* Farmers' Bk., 9 Gill & J. 31; Hoover *v.* Glasscock, 16 La. 242.

[5] Boyd *v.* Cleveland, 4 Pick. 525; Hallowell Nat. Bk. *v.* Marston, 85 Me. 488 (27 A. 529); Barclay *v.* Weaver, 19 Pa. St. 396 (57 Am. Dec. 661); Taylor *v.* French, 2 Lea, 260 (31 Am. Rep. 609); Markland *v.* McDaniel, 51 Kan. 350 (32 P. 1114); Quintance *v.* Goodrow, 16 Mont. 376.

[6] Rodney *v.* Wilson, 67 Mo. 123 (29 Am. Rep. 499); Beller *v.* Frost, 70 Mo. 186; Farwell *v.* St. Paul Trust Co., 45 Minn. 495 (48 N. W. 326); Kern *v.* Von Phul, 7 Minn. 426 (82 Am. Dec. 105); First Nat. Bk. *v.* Maxfield, 83 Me. 576 (22 A. 479)

tention to be bound in the capacity of a guarantor, instead of an indorser.[1]

Presentment, protest and notice constitute three distinct acts, which are required to be done, unless excused or waived, in order to hold liable a secondary obligor to a bill or note. And a waiver of one of them would not necessarily imply a waiver of all. It has thus been held that a waiver of notice will not include by implication a waiver of demand; although it would seem to be more reasonable to infer that a waiver of demand would include a waiver of notice as well as protest, since demand must necessarily precede protest and notice of dishonor.[2] But the later cases show a tendency to follow and adopt the banking custom, wherever it is found to be an established custom, to take the waiver of protest as a complete waiver of technical presentment and notice, as well as of protest. So that it is now very generally held, both as to foreign and inland bills of exchange, that a waiver of protest dispenses also with formal demand and notice.[3]

[1] Union Bk. *v.* Magruder, 7 Pet. 287; Davis *v.* Wells, 104 U. S. 159; Furber *v.* Caverley, 42 N. H. 74; Seabury *v.* Hungerford, 2 Hill, 80; Airey *v.* Pearson, 37 Mo. 424; Blanc *v.* Mut. Nat. Bk., 28 La. Ann. 921 (26 Am. Rep. 119); Small *v.* Clarke, 51 Cal. 227; Wells *v.* Davis, 2 Utah, 411.

[2] *Waiver of notice.* Berkshire Bank *v.* Jones, 6 Mass. 524 (4 Am. Dec. 175); Backus *v.* Shepherd, 11 Wend. 629; Whiteley *v.* Allen, 56 Iowa, 224 (41 Am. Rep. 99; 9 N. W. 190); Camp *v.* Wiggins, 72 Iowa, 643; 34 N. W. 461 (waiver of provision as to place of payment); Sprague *v.* Fletcher, 8 Oreg. 367 (34 Am. Rep. 587).

Waiver of demand. Porter *v.* Kimball, 53 Barb. 467; *s. c.* 3 Lans. 330; Bryant *v.* Merchants' Bk., 8 Bush, 43; Johnson Co. Sav. Bk. *v.* Lowe, 47 Mo. App. 151 (demand and protest).

Waiver of demand and notice, including protest. Davis *v.* Wells, 104 U. S. 159; Woodman *v.* Thruston, 8 Cush. 157; National Exch. Bk. *v.* Kimball, 66 Ga. 758; Baker *v.* Scott, 29 Kan. 136; Jaccard *v.* Anderson, 37 Mo. 91; Wells *v.* Davis, 2 Utah, 411.

[3] Union Bk. *v.* Hyde, 6 Wheat. 572; City Sav. Bk. *v.* Hopson, 53 Conn. 453 (5 A. 601); Johnson *v.* Parsons, 140 Mass. 173 (4 N. E. 196); Coddington *v.* Davis, 1 N. Y. 186; Annville N. Bk. *v.* Kettering, 106 Pa. St. 531 (51 Am. Rep. 536); First Nat. Bank *v.* Falkenhan, 94 Cal. 141 (29 P. 866); Williams *v.* Lewis, 69 Ga. 762; Harvey *v.* Nelson, 31 La. Ann. 434 (33 Am. Rep. 222); Baskin *v.* Crews, 66 Mo. App. 22; Jaccard *v.* Anderson,

It is not material whether the waiver is made before or after the negotiation or indorsement of the bill or note; and where it is done after negotiation and before maturity, any statement made by a drawer or indorser to the holder, such as the uselessness of making presentment and protest, which is calculated to induce the holder to refrain from doing these required things, will operate as a waiver of them.[1]

Requests for extension of the time of payment, when made by, or with the consent, of the drawer or indorser, constitute a waiver,[2] as well as a distinct promise on their part to pay at maturity.[3]

Although, according to the general rules of the law of contracts, it would appear that a waiver of presentment, protest and notice after maturity would not revive an extinguished liability, unless such waiver was supported by a new consideration; the great weight of authority seems to support the proposition, that no new consideration is necessary; and that a waiver has the effect of preserving the liability of a drawer or indorser, whether it is made

37 Mo. 91; Johnson Co. Sav. Bk. *v.* Lowe, 47 Mo. App. 151; Carpenter *v.* Reynolds, 42 Miss. 807; Wilkie *v.* Chandon, 1 Wash. St. 355 (25 P. 464).

[1] Taylor *v.* French, 4 E. D. Smith, 458; Moyer's Appeal, 87 Pa. St. 129; Hammett *v.* Trueworthy, 51 Mo. App. 281 (waiver at maturity); Boyd *v.* Bk. of Toledo, 32 Ohio St. 526 (30 Am. Rep. 624); McMonigal *v.* Brown, 45 Ohio St. 499 (15 N. E. 860). See Landon *v.* Bryant (Vt. '96), 37 A. 296.

[2] Leffingwell *v.* White, 1 Johns. 99 (1 Am. Dec. 97); Cady *v.* Bradshaw, 116 N. Y. 188 (22 N. E. 371); Whittier *v.* Collins, 15 R. I. 44 (23 A. 39); Barclay *v.* Weaver, 19 Pa. St. 396 (57 Am. Dec. 661); Jenkins *v.* White, 147 Pa. St. 303 (23 A. 556); Amoskeag Bk. *v.* Moore, 37 N. H. 539 (75 Am. Dec. 156); Hale *v.* Danforth, 46 Wis. 554 (1 N. W. 284); Glaze *v.* Ferguson, 48 Kan. 157 (29 P. 396). See Landon *v.* Bryant (Vt. '96), 37 A. 296.

[3] Sigerson *v.* Mathews, 20 How. 496; Taunton Bank *v.* Richardson, 5 Pick. 436; Markland *v.* McDaniel, 51 Kan. 350 (32 P. 1114); Seldner *v.* Mt. Jackson Nat. Bk., 66 Md. 488 (8. A. 262); Leonard *v.* Gary, 10 Wend. 504; First Nat. Bk. *v.* Hartman, 110 Pa. St. 196 (1 A. 271); Sleger *v.* Second Nat. Bk., 132 Pa. St. 307 (19 A. 217); Boyd *v.* Bk. of Toledo, 32 Ohio St. 526 (30 Am. Rep. 624); Lary *v.* Young, 13 Ark. 401 (58 Am. Dec. 332); Bryant *v.* Wilcox, 49 Cal. 47.

before or after maturity. Usually, waivers after maturity take the form of promises to pay the bill or note in question or part-payment of the same. And the promise does not constitute a good waiver, unless it is made after full knowledge of the failure of the holder to make presentment and to secure protest and notice.[1]

But the waiver after maturity will be good, although it is made in ignorance of the legal effect of the holder's failure to make the proper presentment and protest and to give the required notice. The universal distinction of the law between ignorance of law and of fact is here applied.[2]

So, also, where the waiver after maturity takes the form of a promise to pay, it must be an absolute promise to pay. A mere promise to "see what can be done" will not be a good waiver.[3]

[1] Sigerson *v.* Matthews, 20 How. 496; Yeager *v.* Farwell, 13 Wall. 6; Matthews *v.* Allen, 16 Gray, 594 (78 Am. Dec. 430); Hobbs *v.* Straine, 149 Mass. 212 (21 N. E. 365); Nat. Bk. of Commerce *v.* Nat. M. B. Assn., 55 N. Y. 211 (14 Am. Rep. 232); Ross *v.* Hurd, 71 N. Y. 14 (27 Am. Rep. 1); Oxmond *v.* Varnum, 111 Pa. St. 193 (2 A. 224); Turnbull *v.* Maddux, 68 Md. 579 (13 A. 334); Newberry *v.* Trowbridge, 13 Mich. 263; Sebree Dep. Bk. *v.* Moreland, 96 Ky. 150 (28 S. W. 153); Givens *v.* Merchants' Nat. Bk., 85 Ill. 442; Lockwood *v.* Bock, 50 Minn. 142 (52 N. W. 391); White *v.* Keith, 97 Ala. 668 (12 So. 611); State Bk. *v.* Bartle, 114 Mo. 276 (21 S. W. 816); Workingmen's Bkg. Co. *v.* Blell, 57 Mo. App. 410; Davis *v.* Miller, 88 Iowa, 114 (55 N. W. 89). See Reinke *v.* Wright, 93 Wis. 368 (67 N. W. 737). But see *contra* as to validity of waiver after maturity without new consideration, Huntington *v.* Harvey, 4 Conn. 124; Lawrence *v.* Ralston, 3 Bibb. 1; and *contra* as to effect of ignorance of the failure to make demand and protest, Debuys *v.* Mollere, 3 Mart. (La.), 318 (15 Am. Dec. 159); Bogart *v.* McClung, 11 Heisk. 105 (27 Am. Rep. 737).

[2] Mathews *v.* Allen, 16 Gray, 594 (78 Am. Dec. 430); Third Nat. Bk. *v.* Ashworth, 105 Mass. 503; Glidden *v.* Chamberlain, 167 Mass. 486 (46 N. E. 103); Givens *v.* Merchants' Nat. Bk., 85 Ill. 442; Hughes *v.* Bowen, 15 Iowa, 446; and, generally, the cases cited in preceding note. But, see *contra*, as to ignorance of fact that his liability was that of an indorser. O'Rourke *v.* Hanchett, 89 Hun, 611.

[3] Prideaux *v.* Collier, 2 Stark. 57; Klosterman *v.* Kage, 39 Mo. App. 60; Crain *v.* Colwell, 8 Johns. 384; Ross *v.* Hurd, 71 N.Y. 14 (27 Am. Rep. 1); Martin *v.* Perqua, 65 Hun, 225; Tardy *v.* Boyd, 26 Gratt. 631; Isbell *v.* Lewis, 98 Ala. 550 (13 So. 335); Whittier *v.* Collins, 15 R. I. 44; 23 A. 39 (request for delay no waiver).

§ 148. **No damage to holder — Loss or destruction of the instrument.**— The mere fact, that the drawer or indorser will suffer no damage, if there should be a failure to make presentment and protest, and to give notice, would not be a sufficient excuse, whether because there were no funds in the drawee's hands, or the acceptor or maker was notoriously insolvent. In all such cases, presentment, protest and notice are nevertheless required, although the drawer or indorser is fully cognizant of all the facts.[1]

The loss of the bill or note prior to maturity will not excuse presentment. For in that case, the commercial law permits and requires presentment to be made without exhibition of the instrument, upon statement of the loss and offer of a bond of indemnity against the subsequent presentation of the paper by a *bona fide* holder. If this is not done, the drawer and indorsers will be discharged.[2]

[1] French *v.* Bk. of Columbia, 4 Cranch, 141; Shaw *v.* Reed, 12 Pick. 132; Buck *v.* Cotton, 2 Conn. 126; Jackson *v.* Richards, 2 Caines, 343; Manning *v.* Lyon, 70 Hun, 345; Commercial Bk. *v.* Hughes, 17 Wend. 94; National Bk. *v.* Bradley, 117 N. C. 526 (23 S. E. 455); Hunt *v.* Wadleigh, 26 Me. 271 (45 Am. Dec. 108); Cedar Falls Co. *v.* Wallace, 83 N. C. 225; Farwell *v.* St. Paul Trust Co., 45 Minn. 495 (48 N. W. 326); Bassenhorst *v.* Wilby, 45 Ohio St. 333 (13 N. E. 75); Hill *v.* Martin, 12 Mart. (La.), 177 (13 Am. Dec. 372); Reinke *v.* Wilson, 93 Wis. 368 (67 N. W. 737); Clair *v.* Barr, 2 Marsh. 255 (12 Am. Dec. 391). But see *ante*, § 144, where the insolvent has absconded.

[2] Fales *v.* Russell, 16 Pick. 315; McGregory *v.* McGregory, 107 Mass. 543; Yerkes *v.* Blodgett, 48 Mich. 211; Armstrong *v.* Lewis, 14 Minn. 406; Smith *v.* Rockwell, 2 Hill, 184. If a bill is drawn in duplicate and the original is lost, a duplicate may be used in presentment and demand. Any reasonable delay in hunting for the original will be excused. Benton *v.* Martin, 31 N. Y. 382; Angaletos *v.* Meridian Nat. Bank, 4 Ind. App. 573 (31 N. E. 368). But a bond of indemnity need not be offered, if the paper is non-negotiable. Wright *v.* Wright, 54 N. Y. 437; Allen *v.* Reilly, 15 Nev. 452. Or, in some States where, in the case of a negotiable instrument, its partial or total destruction by fire or otherwise has been proven beyond all reasonable doubt. Bank of U. S. *v.* Sill, 5 Conn. 106 (13 Am. Dec. 44); Thayer *v.* King, 15 Ohio St. 242 (45 Am. Dec. 571); Scott *v.* Meeker, 20 Hun, 161; Des Arts *v.* Leggett, 16 N. Y. 582; Wade *v.* Wade, 12 Ill. 89.

ILLUSTRATIVE CASES.

Morgan *v.* Bank of Louisville, 4 Bush, 82.
Culver *v.* Marks, 122 Ind. 554 (23 N. E. 1086).
Hobbs *v.* Straine, 149 Mass. 212 (21 N. E. 365).

Presentment, Protest and Notice Excused by War or Disturbances of Public Order, Sufficient to Prevent the Conduct of Business.

Morgan *v.* Bank of Louisville, 4 Bush, 82.

Chief Justice WILLIAMS. This was a suit upon the note of Morgan for two thousand five hundred and ninety-two dollars, dated New Orleans, La., January 23, 1861, payable at the office of Pilcher & Goodrich, New Orleans, at nine months' time, with eight per cent interest, and indorsed by Pilcher & Goodrich and B. P. Scally. The note was not paid at maturity, but protested by a notary public in New Orleans.

Morgan, the maker, let judgment go by default, but Scally, the indorser, insists that he is not liable.

The evidence establishes the following facts, to wit: That Scally resided in Louisville, Ky., when the note fell due, and ever since; that there was then a war between the Southern and Northern States, and no mail communication between New Orleans and Louisville; that the latter post had fallen into the Federal possession, and a mail sent hence to New York May 3, 1862; from which time mail communication became regular and safe once a week; and that the blockade of New Orleans, by order of the President of the United States, was raised June 1, 1862; that the said paper was held by the New Orleans Canal and Banking Company until November 20, 1862, when it was sent by express to the Bank of Louisville, at Louisville, Kentucky, which owned it; and that December 5, 1862, the cashier of the Bank of Louisville deposited a notice in the post office at Louisville, notifying Scally of the dishonor of said paper; that by the laws of Louisiana and custom of merchants such paper is regarded as commercial.

Was this a legal notice to the indorser, Scally?

It is insisted by appellee that no protest or notice was necessary, because of the late Civil War, Louisville and New Orleans then being within the military lines, and held by different belligerents, and claims that this has been so adjudicated by this Court in Graves *v.* Lilford, 2 Duvall, 108; Bell, Berkley & Co. *v.* Hall, Ib. 292, and Berry, etc. *v.* Southern Bank, Ib. 379.

The first case was upon assigned notes — not commercial paper — hence no question of commercial law was involved.

In the case of Bell, Berkley & Co. *v.* Hall, suit, with attachment, was brought but a few days before the bill of exchange fell due, January 13, 1862. It had been drawn and accepted in Kentucky, but payable in New Orleans; the war was flagrant

when it fell due; the bill had not been forwarded to New Orleans for payment, but was in suit in Kentucky; it would have been illegal to attempt then to collect this bill in New Orleans; the maker and indorsers of the bill not only had the presumed notice of open hostilities between the two States, but the actual notice by suit that the holder was looking to them.

In Berry *v.* Southern Bank, the bills of exchange were drawn and indorsed in Kentucky and sold to a Kentucky bank, addressed to a firm in New Orleans, the very day of the President's proclamation of blockade, the official notification of war between Kentucky and Louisiana, and which were not payable until after the Congressional action of non-intercourse and the President's proclamation thereof.

These bills were not accepted, and no evidence that they were ever in New Orleans; but suit was prosecuted upon them against the drawer and indorsers, who resided in Kentucky. It was held, upon these facts, that the war rendered it not only unnecessary, but illegal, to send said bills to New Orleans for collection; and, therefore, protest was unnecessary and notice immaterial, as the public war itself was a notification; and this doctrine is well announced by the court of error in New York (Griswald *v.* Waddington, 16 Johns. 443), well drawing a distinction between commercial paper drawn in one country, payable in another, before and after war breaks out between these countries.

But the facts in the case now under consideration are quite different from those in Berry *v.* Southern Bank. In this case the paper was made in New Orleans before the war broke out, payable in New Orleans after it broke out; the maker and first indorsers were residents of Louisiana when it fell due, and the paper held by a New Orleans bank, though it belonged to a Kentucky bank, and the last indorser, who is now resisting it, was a resident of Kentucky.

The war could be no notice to him that the maker and first indorsers, who were residents of Louisiana, had not paid it to a Louisiana holder; therefore it was essential to notify him of the fact at the earliest practicable period.

The New Orleans holder very properly had it duly presented and protested for non-payment, and notified the Louisiana parties thereof, but could not then notify the Kentucky parties. But reasonable diligence would not require a sending of the notice by the very first mail sent out by the military authorities from New Orleans, through a portion of the enemy's country, because the sending of such mail might not be known, nor might be safe if known. When, however, the mail became regular, and notorious, and safe, it was the duty of the New Orleans holder to notify its principal that it might notify the antecedent Kentucky parties.

In House *v.* Adams, 48 Pa. St. 266, the Supreme Court of Pennsylvania, in case of two bills of exchange drawn and indorsed in that State, on a New Orleans house, and which were protested — the first June 11, 1861, the second July 29, 1861 —

and notice of dishonor received by the holders at Pittsburg, July 11, 1862, and was immediately delivered to the antecedent parties there, held upon the authority of Patience *v.* Townley, 2 Smith's Eng. R. 224, and Hopkins *v.* Page, 2 Brock U. S. R. 20, that notice of the dishonor of such paper was essential so soon as it could reasonably be made; but as, from the evidence, it appeared that the first mail received at Pittsburg from New Orleans was about July 1, 1862, and considerable intervals between them, the notice was deemed reasonable and the indorsers held liable.

The blockade was removed from the port of New Orleans June 1, 1862. The mails were regularly sent to New York, and thence to the other places within the Federal lines regularly once a week. There appears no reasonable excuse for delaying the sending of this paper from New Orleans until November 20, 1862. A delay of five months and twenty days after the blockade was raised, with regular weekly mails, which had gone safely once a week for a month, cannot be deemed reasonable, nor accounted for by the then political situation of the country.

The ports of the Gulf and Southern Atlantic were blockaded by the Federal navy; no part of the route from New York to Louisville was through the enemy's country, or in their possession; hence the line of communication between New Orleans and Louisville, *via* New York, remained open and uninterrupted.

Wherefore the judgment is reversed as to Scally, with directions for further proceedings in accordance herewith.

Presentment of Check for Payment and Notice of Non-payment Excused Where the Drawer has no Funds on Deposit at the Bank.

Culver *v.* Marks, 122 Ind. 554 (23 N. E. 1086).

Olds, J. This is an action by Jacob F. Marks against Malinda Culver, administratrix of the estate of Moses C. Culver, deceased, to recover a claim against the estate of the decedent. It is contended by the appellee that the appeal was not taken and perfected within the time allowed by statute. The appellant asked and obtained leave of this court to appeal, which disposed of this question, and it is unnecessary to consider it further.

Appellant's decedent died in December, 1884, and the claim was filed in February, 1885. The basis of the claim is three checks, copies of which are filed with the complaint, and marked "A," "B," and "C," and are in the following words and figures: (A) "La Fayette, Ind., Nov. 1st, 1869. The First National Bank: Pay to J. F. Marks one thousand dollars. $1,000. [Signed] M. C. Culver." (B) "La Fayette, Ind., Nov. 8th, 1870. First National Bank: Pay to J. F. Marks or bearer five hundred dollars. $500. [Signed] M. C. Culver."

(C) "La Fayette, Ind., Dec. 29th, 1870. First National Bank: Pay to J. F. Marks or bearer one thousand dollars. $1,000.00. [Signed] M. C. Culver." Also three promissory notes,— one dated December 17, 1870, for $1,051.34, executed by the decedent to appellee; one dated September 1, 1870, for $550, executed by decedent to appellee; and one dated July 29, 1872, for $2,000, executed by the decedent to one Smith Lee, and assigned by him to appellee.

There are some 19 paragraphs of complaint, most of them declaring upon the checks, and varying in their allegations. There was no further pleading filed. There was a trial by the court under the statute, and a finding for the appellee on the checks and notes, aggregating $7,694.31. The court's finding is as follows: The court being in all things fully advised, finds that there is due the plaintiff, of and from the administratrix, to be paid out of the estate of the decedent, Moses C. Culver, on account of the note for $2,000, and dated July 29, 1872, the sum of eight hundred and twenty-three dollars and twelve cents ($823.12); on the due-bill dated December 17, 1870, the sum of seven hundred and ninety-six dollars and fifty-nine cents ($796.59); on the two one thousand dollar checks, one dated November 21, 1869, and one dated December 29, 1870, the sum of three thousand nine hundred and thirty-six dollars and twenty six cents ($3,936.26); on the five hundred and fifty dollar note, dated September 1, 1870, the sum of one thousand three hundred and eighty-three dollars and thirty-four cents ($1,383.34), including one hundred and twenty-five dollars and seventy-five cents as and for attorney's fees; and on the check for five hundred dollars, and dated November 8, 1870, the sum of seven hundred and fifty-five dollars, being the principal and interest thereon from the 1st day of January, 1878; and making in the aggregate, the sum of seven thousand six hundred and ninety-four dollars and thirty-one cents ($7,694.31)." The appellant demurred to each paragraph of the complaint, which was overruled, and exceptions. The appellant also filed a motion for a new trial, which was overruled, and exceptions; also moved the court in arrest of judgment, which was overruled and exceptions reserved; and these various rulings of the court are assigned as error. No question is presented as to the sufficiency of the paragraphs on the notes, or the right of the appellee to recover the amount due upon them.

The paragraphs of the complaint are numerous, and we do not deem it necessary to set them out, as we can state the questions presented in much less space. They all declare upon the checks, and aver facts to excuse the necessity for presentment to the bank for payment, and notice to the drawer of non-payment differing in the averments in this particular: Some aver that Culver, the drawer, did not have money or funds sufficient in amount in said bank on the day of the date and delivery of said check, nor did he have enough on the day after the date of drawing and

delivering said check in said bank, to pay said check. The ninth paragraph, declaring on the check dated November 1, 1869, alleges that Culver, the drawer, did not have money or means enough in said bank on the day of the date of said check, nor did he have sufficient funds or money in said bank until the 11th day of November, 1869, to pay said check. Others aver that all the money or means said Moses C. Culver had in said bank on the day of the date of said check, or had at any time thereafter in said bank, were, by said check, paid to said Moses C. Culver, or to other persons on the order, check, or request of the said Culver, and not to the plaintiff on account of said check. Others aver that at the time of the execution and delivery of said check the said Moses C. Culver requested the plaintiff not to present said check to said bank for payment, and that he, the said Moses C. Culver, should be permitted to pay, and that be, the said Culver, would pay, said check without presentment thereof for payment to said bank; and the plaintiff then and there promised not to present for payment said check at said bank, and to permit the said Culver to pay the same without presentment for payment at said bank; that in pursuance of said request of said Culver, and the promise of the plaintiff, the plaintiff did not present said check, nor was the same presented to said bank for payment. The fourteenth paragraph on the check, dated December 29, 1870, alleges that Culver did not have money or means sufficient in amount in said bank on the day of the date of said check, nor did he have enough means or money in said bank for more than 30 days thereafter, to pay said check.

The foregoing are the averments in the respective paragraphs relating to the checks. The several paragraphs are, respectively, based on the checks as the foundation of the action, and the checks constitute a cause of action. Henshaw *v.* Root, 60 Ind. 220; Fletcher *v.* Pierson, 69 Ind. 281. The general rule is that a check must be presented to the bank for payment, and that notice of non-payment must be given to the drawer, but there are exceptions to this rule. In Bolles Banks, p. 325, § 333, it is said: "Another excuse is the lack of funds with the drawee. The drawing of a check under such circumstances, unexplained, is a fraud which deprives the maker of every right to require presentation and demand of payment." In Franklin *v.* Vanderpool, 1 Hall, 78, it is held that, if a maker of a bank-check has no funds in the bank upon which it is drawn at the date of the check, it is not necessary for the holder to present such check at bank for payment, in order to enable him to sustain an action upon it against the maker. Where the maker of a check withdraws his funds from the bank, so that the check cannot be paid, no demand and notice are necessary. Bolles Banks, supra; Sutcliffe *v.* McDowell, 2 Nott & McC. 251. In 2 Morse Banks (3d Ed.), § 425, it is said: "Presentment, however, may be altogether dispensed with, provided that if made it could not at the time be legally and properly met by the bank with a payment;" and

numerous authorities are cited in support of this statement. This is in accordance with a well-settled legal principle that the law requires no unnecessary thing to be done. Checks are presumed to be drawn against a fund deposited in the bank, out of which they are to be paid; and if there is no such fund so deposited out of which they can be paid, the presumption is that a demand will be of no avail, and useless; and it must be further presumed that the drawer knows the state of his account with the bank, and whether or not he has sufficient funds on deposit to pay the check, and if he has not, no demand is necessary; and, if no demand be necessary, then certainly no notice is necessary,— being no demand, there could be no notice of demand. It is further stated in Morse Banks, supra, that "regular presentation may be waived by conduct or representations. Any agreement, express or implied, will excuse any want of the usual formalities." It is further said that "a check given as evidence of a loan to the drawer need not be presented to the drawee."

This doctrine is held in the case of Currier *v.* Davis, 111 Mass. 480. It is the well-settled rule that, in the absence of any agreement or special circumstances, a check shall be presented at least within banking hours on the day following the date of its delivery, if the bank on which it is drawn is in the same place where the payee lives or does business, and that the first presentment fixes the rights of the parties. If, upon such presentation, the bank offers and is willing to pay, and the payee refuses to accept it, and afterwards, and before it is again presented, the bank fails, as between the payee and the drawer the payee suffers the loss. See 2 Morse, Banks, §§ 421, 426. And it must necessarily follow, from the well-settled law regarding checks, that if the drawer has no funds in the bank at the time the payee is by law required to present the check for payment, no necessity for demand and notice exists, and that the liability of the parties is fixed at this time. That is to say, if demand and notice be necessary, demand must be made on the day following the delivery of the check, if the bank is in the same place where the payee lives, and does business, and notice must be given, and the liability is thereby then and there fixed, and the payee may immediately bring suit. So, on the other hand, it must logically flow and necessarily follow from this rule that if the drawer has no money or funds on deposit in the bank at the time the payee is required to present the check, then the liability of the drawer is fixed without presentation and notice, and the payee may at once bring suit on the check; and whatever takes place afterwards in the state of his account at the bank can make no difference, and will not change the rights of the parties. The authorities cited, we think, are decisive of all the questions presented by the rulings on the demurrers to the several paragraphs of complaint; and that the general rule is that the payee must present the check for payment, and give notice to the drawer of its non-payment, but that no presentation or notice is necessary when the drawer has no

funds on deposit for the payment of the check at the time when the check should be presented; or if he have funds on deposit at the time, and withdraw the same, leaving none on deposit for the payment of the check, or if by consent of the drawee or agent between him and the payee the check is not to be presented at the bank for payment, then there is no necessity for presentation and notice. There was no error in overruling the demurrers to the complaint.

It is contended that the right of recovery was barred by limitation. What we have said in passing upon the complaint disposes of this question. The check being in writing, and constituting the foundation of the action, it is not barred by the statute of limitations. A question is made as to the check. It is contended that as the complaint alleges that the checks were drawn on the "First National Bank of La Fayette, Indiana," and that there was no proof of such fact except that the checks were read in evidence and that the checks are drawn on the "First National Bank," that the proof made by the introduction of the checks does not correspond with the averments of the complaint. The checks were copied and made a part of the respective paragraphs of the complaint which declared upon them, and showed affirmatively in each paragraph of the complaint the name of the bank upon which they were drawn. They were each dated at "La Fayette, Indiana," and drawn on the "First National Bank," and the name of no other place or bank appeared upon the check; and the evidence showed that there was a First National Bank at La Fayette, and that fair presumption, in the absence of anything appearing to the contrary, is that it related to, and that they were drawn upon, that bank. Walker *v.* Woollen, 54 Ind. 164; Roach *v.* Hill, Id. 245; Dutch *v.* Boyd, 81 Ind. 146.

It is not contended that there is no evidence to support the allegations of the paragraphs of the complaint which allege that it was agreed that appellee should not present the checks at the bank for payment, but that Culver should pay them without presentation. This can make no difference. There were several other paragraphs of the complaint, respectively declaring on each of the checks, and, if the evidence supported one paragraph declaring on each check, the finding would be sustained. It was not necessary, because appellee declared on each cause of action in several various forms of averments, that he should prove the allegations of each paragraph of his complaint.

It is contended that the assessment of the amount of recovery is too large; that the court allowed interest upon the checks. In this there is no error. Under the law, as we have stated, the cause of action accrued upon the checks at the time they should have been presented, if there had been money in the bank for their payment; and, as the payee resided at the same place where the bank was doing business, this would be the next day after the delivery of the check, and appellee is entitled to interest from that date.

We now come to questions presented by the motion for new trial on the admission and rejection of evidence. The appellant offered to prove by Mr. M. L. Pierce, president of the bank, that if, at the date of several checks, or at any time during the years 1869 and 1870, checks for like amounts had been presented to the First National Bank, drawn by Moses C. Culver by the holder of such checks, they would have been paid. The offer was properly made. The witness was sworn, and asked the proper question, and the evidence was excluded. In this ruling of the court there was no error. The evidence offered is to the effect that the bank could have paid the checks without regard to whether Mr. Culver had funds in the bank or not. It is a well-settled rule that the liabilities of the parties are fixed by the fact of the drawer having or not having funds in the bank out of which the check could be lawfully paid, and the fact that he had no funds in the bank against which the check is drawn, and out of which he had a legal right to have it paid, or, in other words, if the bank was not at the time indebted to the drawer for money deposited, whereby he had the right to expect the bank to pay the check and charge it to him as against such deposit account, then the payee was relieved from making a demand; and this cannot be changed by a willingness on the part of the bank to pay the check of the drawer, notwithstanding he may have no funds on deposit. The payee took the check with the legal obligation resting upon him to present the check at the bank for payment, and if he failed to do so, and the drawer had funds in the bank to pay it, and loss ensued by reason of such failure, the payee suffers the loss; but, if the drawer had no funds in the bank for the payment of the check, the payee is excused from presenting the check for payment. If the drawer has no funds in the bank at the time for presentment for payment, there is no legal obligation resting upon the payee to present it for payment. The bank had no legal right to permit the drawer to overdraw and pay his check out of the funds of other depositors, or the money of the stockholders.

The next question for consideration is the exception of the appellant to the ruling of the court to the admission in evidence of the entries in the books of the First National Bank, made in the usual course of business, showing the state of the account of said Moses C. Culver at and subsequent to the execution of the checks sued upon. As preliminary to the introduction of the entries in these books in evidence, it was shown by the clerks and officers of the bank, produced in court as witnesses, and as to the entries made by such witnesses, that they were at the time the entries were made the proper and authorized book-keepers to make such entries; that the entries were made by them in the due course of business, in the discharge of their duties, and were correct when made; that the entries made by them were original and entered by them in books kept for that purpose; and that they had no recollection of the facts represented by the entries. As to the entries made by parties who were not witnesses, it was

shown that the enterer was at the time the entry was made the proper book-keeper and agent of the bank to make the entries in the due course of business; that the entries were original entries, in original books, made by such book-keepers, in due course of business, and were in the known handwriting of such book-keepers; and that the enterer was dead or a non-resident of the State of Indiana. After the making of such preliminary proof, the entries weie admitted in evidence, over the objection of the appellant. It was proper to prove in this case the state of Moses C. Culver's account with the bank upon which he drew the checks, at the time he drew them, and subsequent thereto, under the issues in the case. And it is pertinent to the question to consider how such facts could be proven, if the evidence introduced was not admissible or competent for that purpose. The bank with which he did business, and upon which he drew the check, kept books and made an entry of all their business, — of the money deposited by Culver, and checks drawn by him and paid by the bank. The books were kept by disinterested parties. Some of the persons who at the time of the transaction kept the books took the deposit and placed it to Culver's credit, paid the checks drawn by him, and entered them on the books, or charged them to his account, were dead. Others were beyond the jurisdiction of the court, and others had no personal recollection of the transaction, except to know that the books were kept in due course of the banking business, and were correct, and showed a correct statement of the account. Unless the evidence admitted was competent, the appellee is deprived of making proof of the facts.

Price *v.* Torrington, 1 Smith Lead. Cas. (9th Ed.) 566, was an action for beer sold and delivered. It was held that a book containing an account of the beer delivered by the plaintiff's drayman, and which it was the duty of the drayman to sign daily, was competent to prove the delivery, on proof that the drayman was dead, and of his handwriting. In a note to this case it is said: "A party's own books of account and original entries are now, in most, if not all, of the United States received as evidence of a sale and delivery of goods to, or of work done for, the adverse party." On the same subject it is further said: "The reason for its introduction has never been placed by any court on higher ground than that of necessity; for, in view of the number and frequency of transactions of which entries are daily required to be made, the difficulty and inconvenience of making formal common-law proof of each item would be very great. To insist upon it, therefore, would either render a credit system impossible, or leave the creditor remediless." In 1 Greenl. Ev. (14th Ed.), § 115, it is said: "It is upon the same ground that certain entries made by third persons are treated as original evidence. Entries by third persons are divisible into two classes: *First*, those which are made in the discharge of official duty and in the course of professional employment; and, *secondly*, mere private entries. Of these latter we shall hereafter speak. In regard to

the former class, the entry, to be admissible, must be one which it was the person's duty to make, or which belonged to the transaction as part thereof, or which was its usual and proper concomitant." In 1 Whart. Ev. (3 Ed.), § 238, it is said: "An accountant or other business agent may be regarded as a member of a well-adjusted business machine, noting in the proper time and in the proper way what it is his duty to note. If he has no personal motive to swerve him, the inference is that what he does in this way he does accurately; and his evidence, if there be nothing to impeach it, rises in authority precisely to the extent to which he is to be regarded as a mechanical and self-forgetting register of the events which his accounts are offered to prove. Hence it is that the memoranda or book entries of an officer, agent, or business man, when in the course of his duties, become evidence after his decease, or after he has passed out of the range of process, or become incompetent to testify of the truth of such entries; subject, however, to be excluded, if it appears that in making the entries he was not registering, but manufacturing, current facts." The rule, as stated by Greenleaf and Wharton, is well supported by authorities. Sickles *v.* Mather, 20 Wend. 70. In The Faxon *v.* Hollis, 13 Mass. 427, the book of a blacksmith, kept in ledger form, the items being first noted down on a slate and then entered in the book, was held to be competent evidence. Reynolds *v.* Manning, 15 Md. 510; Kelsea *v.* Fletcher, 48 N. H. 282; Coolidge *v.* Brigham, 5 Metc. 68; New Haven Co. *v.* Goodwin, 42 Conn. 230. In Alter *v.* Berghaus, 8 Watts, 77, it is held that the absence of a witness from the State, so far as it effects the admissibility of secondary evidence, has the same effect as his death. This was in relation to the admission in evidence of original entries in books made by such absent person. We think the evidence is clearly admissible, but we might add that, as regards the books kept by bookkeepers and officers of National Banks, by section 5209, Rev. St. U. S., it is made a penal offense to make a false entry in any such books; so that these entries were not only made as original entries in the due course of business, but the persons making them were liable to criminal prosecution, and, upon conviction, to suffer imprisonment, if they made a false entry.

A book-keeper for the bank made out a statement of all the items of Culver's account appearing in the books of the bank, and appeared and was sworn as a witness, and stated that he had prepared such statement, and had it with him, and with the books before him was interrogated as to what items appeared in the account. The court permitted such statement so made out and testified to by the witness in evidence, and allowed the same to be read to the jury, over the objection and exceptions of the appellant, and this ruling of the court is complained of as an error. This was a long statement of accounts, and the witness who made out the statement was subject to cross-examination.

The appellant had an opportunity to test its correctness, and cross-examine the witness who made out the statement. The appellant had as full and complete an opportunity to discover any error in the statement made by the witness as if he had appeared as a witness and testified from the books without making any written statements. When the entries in books are numerous and complicated, it is competent to permit an expert book-keeper, who has examined the books, to give a summary oral statement of their contents and computations made. See The Work of the Advocate, by Elliott, page 217, and authorities there cited. See, also, Von Sachs *v.* Kretz, 72 N. Y. 548; McCormick *v.* Railroad Co., 49 N. Y. 315; Howard *v.* McDonough, 77 N. Y. 593. We see no reason why, when such expert witness who has examined the books and made an abstract of them, testifies as a witness, and opportunity is given for cross-examination in regard to such statement, as in this case, the statement may not be admitted in evidence and read to the jury. We think the abstract of the books was properly admitted, but the original entries made in the books were also in evidence in this case, and no complaint is made that the statement did not correspond with the books, and, whether properly admitted or not, no harm could have resulted to the appellant by reason of the admission of such statement, and therefore no reason exists for the reversal of the case. Bank *v.* Adams, 91 Ind. 286; Hays *v.* Morgan, 87 Ind. 231–236. There is a further question as to the same ruling of the court in refusing to allow the appellant to ask one Spencer a cross-examining question. We have considered this, and there was no error. There is no error in the record for which the judgment should be reversed. Judgment affirmed, with costs.

Sufficiency of Notice of Dishonor — Promise to Pay After Dishonor Constitutes a Waiver.

Hobbs *v.* Straine, 149 Mass. 212 (21 N. E. 365).

Morton, C. J. Notice of the dishonor of a note is sufficient to charge an indorser, if it is delivered to him personally, or is left at his place of residence or of business, or is deposited in the mail, addressed to him at his place of residence or of business, the postage being prepaid. Pub. St. c. 77, § 16; Bank *v.* Shaw, 144 Mass. 421; 11 N. E. Rep. 666; Bank *v.* Shaw, 142 Mass. 290; 7 N. E. Rep. 779. The underlying principle of all the decisions upon the subject is that reasonable diligence must be used by the holder in getting notice of the dishonor to the indorser. In the case at bar the evidence tended to show that the plaintiff in due time sent a written notice of the dishonor, addressed to the defendant, to his office, which was his place of business, and, finding no one in, left it there. The precise place in the office where it was left was not fixed with certainty, and

the court instructed the jury that, if they found that it was left in a conspicuous place in the office, it was a sufficient notice. This ruling was correct. The jury might well find that the notice was left in good faith in the defendant's office in such way that he would be likely to see it when he came in. Such a mode of giving the notice would ordinarily be as effectual as if it were sent by mail, through a letter carrier. We think the evidence shows a compliance with the rule of law requiring the holder to exercise reasonable diligence, and that the notice was sufficient to charge the defendant as indorser.

There being conflicting evidence as to the sufficiency of the notice, the plaintiff at the trial relied upon a waiver by the defendant of any defect in the notice, and introduced evidence tending to show that after the note matured the defendant promised to pay; he testifying that at the time of the alleged promise he knew that he was released from liability on account of the failure to receive notice. This was evidence of a waiver, and the instruction of the court to the jury that "if the defendant, knowing all the facts which released him from liability, and knowing or believing himself to be discharged from liability as indorser, promised to pay the note, they would be warranted in finding for the plaintiff," was sufficiently favorable to the defendant. Bank *v.* Ashworth, 105 Mass. 503; Rindge *v.* Kimball, 124 Mass. 209. Exceptions overruled.

CHAPTER XIV.

FORGERY AND ALTERATION OF BILLS AND NOTES.

SECTION 149. Forgery defined and explained.
150. Forgery, alteration and spoliation distinguished.
151. The effect of authorized alterations.
152. Presumption as to time of alteration and burden of proof.
153. What are material alterations.
154. What are immaterial alterations.
155. Rights of *bona fide* holder of forged or altered bill or note.
156. Recovery of money paid on a forged bill or note.

§ 149. **Forgery defined and explained.**— Forgery may be defined as "the act of falsely making or materially altering, with intent to defraud, any writing, which, if genuine, might be of legal efficacy, or the foundation of a legal liability" (Standard Dictionary). Although the more common kind of forgery is the signing of one's name to a legal instrument, that is otherwise genuine, or the complete execution of such an instrument in another's name, including the signature; it is just as much a forgery, if one should write over the genuine signature of another what he was not authorized to write, and representing fraudulently a liability as a party to a bill or other legal instrument which does not exist. It is pronounced to be a forgery even where a fraudulent representation is made as to the personality of the individual, who has executed the bill or note; as where two people bear the same name, and the instrument is executed by one, and it is transferred under a misrepresentation that it was executed by the other person of the same name.[1] The signature of a fictitious name, where it is made with intent to defraud, has been held to be a forgery.[2]

[1] Com. *v.* Foster, 114 Mass. 311 (19 Am. Rep. 353).

[2] Schultz *v.* Astley, 2 Bing. N. C. 544; Rex *v.* Ballard, 1 Leach, 97; United States *v.* Turner, 7 Pet. 132; Brown *v.* People, 8 Hun, 562; ex parte Hibbs, 26 Fed. Rep. 421; State *v.* Givens, 5 Ala. 747; Com. *v.* Costello, 120 Mass. 358.

§ 150. **Forgery, alteration and spoliation distinguished.**— The intent to defraud is an essential element of forgery; and where an otherwise genuine bill or note has been altered in any of its material parts, with intent to defraud, it is just as much forgery, as if the original instrument had been a counterfeit.[1] And these fraudulent alterations not only avoid the bill or note itself, but they also extinguish the debt or obligation, which constitutes the consideration of the instrument.[2] But while an innocent alteration, if material, will avoid a bill or note, the action on the original consideration can nevertheless be maintained. This is at least the trend of judicial opinion.[3] It is, however, true that, as long as no one has suffered any material injury from an innocent alteration, a court of equity jurisdiction has the power to decree a restoration of the instrument to its original condition, and reinstate the parties to their original rights under it. But the court will never interfere, where the alteration was fraudulent.[4] An innocent immaterial alteration has no practical effect

[1] Wheelock *v.* Freeman, 13 Pick. 165 (23 Am. Dec. 674); Belknap *v.* National Bank of N. A., 100 Mass. 376 (97 Am. Dec. 105); Hamilton *v.* Hooper, 46 Iowa, 515 (26 Am. Rep. 161); Burwell *v.* Orr, 84 Ill. 465; White *v.* Continental Nat. Bank, 64 N. Y. 316 (21 Am. Rep. 612).

[2] Wheelock *v.* Freeman, 13 Pick. 165 (23 Am. Dec. 674); Meyer *v.* Hunecke, 55 N. Y. 412; Booth *v.* Powers, 56 N. Y. 22; Flanagan *v.* Nat. Bk. of Dover, 2 N. Y. S. 488; 18 N. Y. St. Rep. 826; Gettysburg N. Bk. *v.* Chisolm, 169 Pa. St. 564 (32 A. 730); Hurlbut *v.* Hall, 39 Neb. 889 (58 N. W. 538); Ballard *v.* Franklin Ins. Co., 81 Ind. 239; Merrick *v.* Boury, 4 Ohio St. 70; Coggins *v.* Stockard, 64 Miss. 301 (1 So. 245); Middaugh *v.* Elliott, 1 Mo. App. 462.

[3] Atkinson *v.* Hawden, 2 Ad. & El. 628; Angle *v.* N. W. etc. Ins. Co., 92 U. S. 342; Meyer *v.* Hunecke, 55 N. Y. 412; Booth *v.* Powers, 56 N. Y. 22; Hunt *v.* Gray, Jr., 35 N. J. L. 227 (10 Am. Rep. 232); Harsh *v.* Klepper, 28 Ohio St. 200; Vogle *v.* Ripper, 34 Ill. 100 (85 Am. Dec. 298); Clough *v.* Seay, 49 Iowa, 111; Sullivan *v.* Rudisill, 63 Iowa, 158; Matteson *v.* Ellsworth, 33 Wis. 488 (14 Am. Rep. 766; Moore *v.* Hutchinson, 69 Mo. 429; State Sav. Bk. *v.* Shaffer, 9 Neb. 1 (31 Am. Rep. 394). But see Bigelow *v.* Stilphen, 35 Vt. 521; Toomer *v.* Rutland, 57 Ala. 379 (29 Am. Rep. 722).

[4] Chadwick *v.* Eastman, 53 Me. 10; Citizens Nat. Bk. *v.* Richmond, 121 Mass. 110; Kountz *v.* Kennedy, 63 Pa. St. 187 (3 Am. Rep. 541); Horst *v.* Wagner, 43 Iowa, 373 (22 Am. Rep. 255).

whatever on the bill or note. But it has been held,[1] and likewise denied[2] that an immaterial fraudulent alteration will avoid it.

Where an alteration is made in the contents of a bill or note by a stranger without the consent or procurement of any party thereto, it is called a *spoliation*. And in the United States, it is held to have no effect on the liability of the parties, as long as the original terms of the instrument can be deciphered, with reasonable certainty.[3]

§ 151. **The effect of authorized alterations.**— If the alteration is made with the consent of the parties to a bill or note, it has the effect of making a new contract as a substitute for the original. If the consent of all the parties is obtained, all of them are, of course, bound by the new contract; but if the alteration is made with the approbation of only a part of them, those consenting will be bound, while the others will be discharged from all liability.[4]

The consent to the alteration need not precede its execution. It may be ratified subsequently by a recognition of the altered bill or note. If, however, the act of recognition is done without knowledge of the alteration, it will

[1] Lubbering *v.* Kohlbrecher, 22 Mo. 598; Kingston Sav. Bk. *v.* Bosserman, 52 Mo. App. 269. See Craighead *v.* McLoney, 99 Pa. St. 211; Johnston *v.* May, 76 Ind. 293.

[2] Moge *v.* Herndon, 30 Miss. 110; Mt. Morris Bk. *v.* Lawson, 27 N. Y. S. 272; Reed *v.* Roark, 14 Tex. 329 (65 Am. Dec. 127); Humphreys *v.* Crane, 5 Cal. 173.

[3] Ford *v.* Ford, 17 Pick. 418; Drum *v.* Drum, 133 Mass. 566; Colson *v.* Arnot, 57 N. Y. 253 (15 Am. Rep. 496); Bigelow *v.* Stilphen, 35 Vt. 521; Ballard *v.* Franklin Ins. Co., 81 Ind. 239; Lee *v.* Alexander, 9 B. Mon. 25 (48 Am. Dec. 412); Union Bk. *v.* Roberts, 45 Wis. 373; Lubbering *v.* Kohlbrecher, 22 Mo. 596; Vogle *v.* Ripper, 34 Ill. 100 (85 Am. Dec. 298); Hamilton *v.* Hooper, 46 Iowa, 515 (26 Am. Rep. 161).

[4] Warring *v.* Williams, 8 Pick. 322; Bailey *v.* Taylor, 11 Conn. 531 (29 Am. Dec. 321); Stahl *v.* Berger, 10 Serg. & R. 170 (13 Am. Dec. 666); Myers *v.* Nell, 84 Pa. St. 369; Taddiken *v.* Cantrell, 69 N. Y. 597 (25 Am. Rep. 253); Bk. of Ghio Valley *v.* Lockwood, 13 W. Va. 392 (31 Am. Rep. 768); Morrison *v.* Smith, 13 Mo. 234 (53 Am. Dec. 145); Overton *v.* Mathews, 35 Ark. 146 (37 Am. Rep. 9); Stewart *v.* First Nat. Bank, 40 Mich. 348; Grimstead *v.* Briggs, 4 Iowa, 559.

operate as an estoppel, to bind the party acting, only to a *bona fide* holder.[1]

§ 152. **Resumption as to time of alteration and burden of proof.**— Where the alteration is so well done that it is not readily recognized by an examination of the paper, the burden of proof is on the party alleging the alteration; and it is presumed that the alteration was made contemporaneously with the execution of the bill or note.[2] Some of the cases hold that the alteration is presumed to have been made at the time of execution of the instrument, whether it is apparent or concealed, throwing the burden of proof in every case on the defendant.[3] Other cases maintain that, where the alteration is apparent, the burden is on the plaintiff to prove that it was made prior to negotiation of the bill or note, or that it was made with the consent of the parties, if made subsequently.[4]

§ 153. **What are material alterations.**— Any alteration is material which changes the liability of the parties in any way; and the alteration will avoid the bill or note, whether it is favorable or unfavorable to the party making it; on the ground that any change in the terms of the instrument affects its identity.

[1] Humphreys *v.* Guillow, 13 N. H. 385 (38 Am. Dec. 499); Woodworth *v.* Bank of America, 16 Johns. 391 (10 Am. Dec. 239); Clute *v.* Small, 17 Wend. 238; Wellington *v.* Jackson, 121 Mass. 157; Fraker *v.* Cullom, 21 Kan. 555; Evans *v.* Foreman, 60 Mo. 449; Bell *v.* Machin, 69 Iowa, 408; Goodspeed *v.* Cutler, 75 Ill. 534.

[2] Meikel *v.* State Sav. Bk., 36 Ind. 355; United States *v.* Linn, 1 How. 104; Odell *v.* Gallup, 62 Iowa 253 (17 N. W. 502); Lowman *v.* Auberry, 72 Ill. 619.

[3] Dodge *v.* Haskell, 69 Me. 429; Davis *v.* Jenney, 1 Met. 221; Bailey *v.* Taylor, 11 Conn. 531 (29 Am. Dec. 321); Cochran *v.* Nebeker, 48 Ind. 460; Paramore *v.* Lindsey, 63 Mo. 63; Wilson *v.* Harris, 35 Iowa, 507; Corcoran *v.* Doll, 32 Cal. 82. See Hayden *v.* Goodnow, 39 Conn. 164.

[4] Wilde *v.* Armsby, 6 Cush. 314; Ely *v.* Ely, 6 Gray 439; Simpson *v.* Stockhouse, 9 Pa. St. 186 (49 Am. Dec. 554); Long *v.* Mason, 84 N. C. 15; Willet *v.* Shepard, 34 Mich. 106; White *v.* Haas, 32 Ala. 430 (70 Am. Dec. 548); Page *v.* Danaher, 43 Wis. 221; Walters *v.* Short, 10 Ill. 252. See Neil *v.* Case, 25 Kan. 510 (37 Am. Rep. 259), for a full discussion of the contradictory opinions of the courts on this question.

The following have been held to be material alterations: 1. Any change in the date of the instrument.[1] 2. Any change in the time of payment.[2] 3. In the amount of principal or rate of interest;[3] or in the medium of payment, as whether payable in gold or generally.[4] 4. Any alteration in the personality, number and relations of the parties to the bill or note, to the detriment of any of the parties thereto.[5] 5. Any change whatsoever in the liability of the parties, by the erasure or addition of words; as, for example, the

[1] Wood *v.* Steele, 6 Wall. 80; Crawford *v.* West Side Bank, 100 N. Y. 50 (2 N. E. 881; 53 Am. Rep. 152); Stephens *v.* Graham, 7 Serg. & R. 505 (10 Am. Dec. 485); Newman *v.* King, 54 Ohio St. 273 (43 N. E. 683); Benedict *v.* Miner, 58 Ill. 19; Wyman *v.* Yeomans, 84 Ill. 403; Britton *v.* Dierker, 46 Mo. 591 (2 Am. Rep. 553); Overton *v.* Mathews, 35 Ark. 146 (37 Am. Rep. 9); Brown *v.* Straw, 6 Neb. 536 (29 Am. Rep. 369). But it is held not to be a material alteration to change the date of an indorsement. Griffith *v.* Cox, 1 Overt. 210.

[2] Hervey *v.* Harvey, 15 Me. 357; Ives *v.* Farmers' Bank, 2 Allen 236; Stayner *v.* Joice, 82 Ind. 35; Lester *v.* Rogers, 18 B. Mon. 537; Bay *v.* Shrader, 50 Miss. 326; King *v.* Hunt, 13 Mo. 97; Benjamin *v.* Delahay, 9 Ill. 536.

[3] McGrath *v.* Clark, 56 N. Y. 34 (15 Am. Rep. 372); Schwartz *v.* Oppold, 74 N. Y. 307; Fay *v.* Smith, 1 Allen, 477 (79 Am. Dec.752); Draper *v.* Wood, 112 Mass. 315 (17 Am. Rep. 92); Craighead *v.* McLoney, 99 Pa. St. 211; Gettysburg N. Bk. *v.* Chisolm, 169 Pa. St. 564 (32 A. 730); Derr *v.* Keough (Iowa), 65 N. W. 339; Franklin L. Ins. Co. *v.* Courtney, 60 Ind. 134; Aetna Bk. *v.* Winchester, 43 Conn. 391; Farmers' & M. N. Bk. *v.* Novich (Tex.), 34 S. W. 914; Kilkelly *v.* Martin, 34 Wis. 525; Little Rock Trust Co. *v.* Martin, 57 Ark. 277 (21 S. W. 468); Iron Mountain Bank *v.* Murdock, 62 Mo. 70; Hurlbut *v.* Hall, 39 Neb. 889 (58 N. W. 538).

[4] Angle *v.* N. W. &c. Ins. Co., 92 U. S. 330; Church *v.* Howard, 17 Hun 5; Darwin *v.* Ripley, 63 N. C. 318; Bogarth *v.* Breedlove, 39 Tex. 561. But see Bridges *v.* Winters, 42 Miss. 135 (97 Am. Dec. 443; 2 Am. Rep. 598).

[5] Monson *v.* Drakely, 40 Conn. 552 (16 Am. Rep. 74); Howe *v.* Taggart, 133 Mass. 284; Stoddard *v.* Penniman, 108 Mass. 366 (11 Am. Rep. 363); York *v.* Jones, 14 Vroom (42 N. J. L.), 332; Bank of Commerce *v.* Union Bank, 3 N. Y. 230; Smith *v.* Weld, 2 Pa. St. 54; Barrington *v.* Bk. of Washington, 14 Serg. & R. 405; Hamilton *v.* Hooper, 46 Iowa, 515 (26 Am. Rep. 161); Nicholson *v.* Combs, 90 Ind. 515 (46 Am. Rep. 229); Wallace *v.* Jewell, 21 Ohio St. 163 (8 Am. Rep. 48); Gillett *v.* Sweat, 6 Ill. 475; Burlingame *v.* Brewster, 79 Ill. 515 (22 Am. Rep. 177); Morrison *v.* Garth, 78 Mo. 434; Harper *v.* Stroud, 41 Tex. 636; Haskell *v.* Champion, 30 Mo. 136. But see Brownell *v.* Winnie, 29 N. Y. 400 (86 Am. Dec. 314); Favorite *v.* Stidham, 84 Ind. 423.

insertion of words of negotiability in the body of the bill or note.[1] 6. Alteration in the place of payment, either in inserting, changing or erasing a specific place of payment.[2]

In the N. Y. Negotiable Instruments Law, 1897, § 206, a material alteration is declared to be any alteration which changes, 1, the date; 2, the sum payable, either for principal or interest; 3, the time or place of payment; 4, the number or the relations of the parties; 5, the medium or currency in which payment is to be made. Or which adds a place of payment where no place of payment is specified, or any other change or addition which alters the effect of the instrument in any respect.

§ 154. **What are immaterial alterations?** — An alteration is immaterial, whenever it does not change the legal effect of the instrument, as where words are added which are implied by law, or where words of no legal importance are stricken out or added. A few examples will be given for the purposes of illustration.

[1] Granite Ry. Co. *v.* Bacon, 15 Pick. 239; Belknap *v.* Nat. Bk. of N. A., 100 Mass. 376 (97 Am. Dec. 105); Booth *v.* Powers, 56 N. Y. 22; McCauley *v.* Gordon, 64 Ga. 221 (37 Am. Rep. 68); Johnson *v.* Bank of U. S., 2 B. Mon. 310; Weaver *v.* Bromley, 65 Mich. 212 (31 N. W. 839); Brown *v.* Straw, 6 Neb. 536 (29 Am. Rep. 369); Union Nat Bk. *v.* Roberts, 45 Wis. 373; Croskey *v.* Skinner, 44 Ill. 321 (erasure of a guaranty). Hemmenway *v.* Stone, 7 Mass. 58 (5 Am. Dec. 27); Reeves *v.* Pierson, 23 Hun 185 (statement of consideration); Woodworth *v.* Bank of America, 16 Johns. 391 (10 Am. Dec. 239) addition or erasure of memoranda); Benedict *v.* Cowden, 49 N. Y. 396 (10 Am. Rep. 382) (ditto); Wait *v.* Pomeroy, 20 Mich. 425 (4 Am. Rep. 395) (ditto).

[2] Nazro *v.* Fuller, 24 Wend. 374; Southwark Bank *v.* Gross, 35 Pa. St. 80; Bank of Ohio Valley *v.* Lockwood, 13 W. Va. 392 (31 Am. Rep. 768); White *v.* Hass, 32 Ala. 430 (70 Am. Dec. 548); McCoy *v.* Lockwood, 71 Ind. 319; Townsend *v.* Star Wagon Co., 10 Neb. 615 (35 Am. Rep. 493); Adair *v.* Egland, 58 Iowa, 314 (12 N. W. 277). But see Am. Nat. Bk. *v.* Bangs, 42 Mo. 450 (97 Am. Dec. 349).

It must be remembered, however, in this connection, that the drawee, in accepting a bill, has the right to stipulate a specific place of payment in the same city or town, where none has been provided for by the drawer. Myers *v.* Standart, 11 Ohio St. 29; Troy City Bk. *v.* Lanman, 19 N. Y. 477. In the latter case, the drawee is held to have this right, even though some other bank or banking house is designated by the drawer as the place of payment.

Inasmuch as the cashier of a bank is authorized to make his bank a party to a bill, note or check, by adding to his own signature the word "cashier;" it is not considered to be a material alteration for any one without authority to add to the signature the name of the bank of which he is cashier.[1] Inasmuch as the marginal figures of the amount of money payable on a note or bill are held not to be a part of such note or bill, any alteration of them is not considered to be so material as to affect the rights of the parties in the instrument.[2] So, also, and for the same reason, is it held to be immaterial, if a change is made in the figures in the margin, which denote the number of the bill, note or check, in a particular series.[3] Other examples might be added, such as changes in the names of the parties, in order to make the written name conform to the real name of the party.[4] In all of them, the alteration is held to be immaterial, because the substantial rights and liabilities have not in any wise been thereby affected.[5]

§ 155. **Rights of bona fide holder of forged or altered bill or note — Effect of estoppel.**— The general rule is that a party to a bill or note, whose liability thereon has been affected by an alteration in its terms and provisions, is not liable, even to a *bona fide* holder.[6] And there are cases

[1] Folger *v.* Chase, 18 Pick. 63; Bank of Genesee *v.* Patchin Bank, 13 N. Y. 309. See *ante*, § 44.

[2] Smith *v.* Smith, 1 R. I. 398 (53 Am. Dec. 652); Houghton *v.* Francis, 29 Ill. 244. But see Garrard *v.* Lewis, L. R. 10 Q. B. 30. See *ante*, §21.

[3] Com. *v.* Indust. Sav. Bk., 98 Mass. 12; Birdsell *v.* Russell, 29 N. Y. 220; City of Elizabeth *v.* Force, 29 N. J. Eq. (2 Stew.) 587; State *v.* Cobb, 64 Ala. 127; Suffell *v.* Bank of England, L. R. 7 Q. B. 270.

[4] Manufacturers & M. Bk. *v.* Follett, 11 R. I. 92 (23 Am. Rep. 418); Hayes *v.* Matthews, 63 Ind. 412 (30 Am. Rep. 226); Burlingame *v.* Brewster, 79 Ill. 515 (22 Am. Rep. 177); Ryan *v.* First Nat. Bank, 148 Ill. 349 (35 N. E. 1120); Blair *v.* Bank of Tennessee, 11 Humph. 84.

[5] See Cushing *v.* Field, 70 Me. 50 (35 Am. Rep. 293); Leonard *v.* Phillips, 39 Mich. 182 (33 Am. Rep. 370); Ryan *v.* First Nat. Bk., 148 Ill. 349 (35 N. E. 1120); Brock *v.* Brock, 29 Ill. App. 334 (interest from maturity); Holland *v.* Hatch, 15 Ohio St. 464.

[6] Roach *v.* Woodall, 91 Tenn. 206 (18 S. W. 407); Newman *v.* King,

which hold that such a party is not in any case liable to any one on the altered bill or note, where the alteration has been made without his consent.[1] But the weight of judicial opinion is cast in favor of the proposition that, if the alteration is so successful that it cannot be readily detected, and it has been made possible by the negligence of the party executing the instrument, in leaving blank spaces uncanceled, a *bona fide* holder can recover on the altered instrument against the party whose negligence is thus established. But negligence on the part of the maker or drawer, and successful concealment of the fact of alteration, must co-exist.[2]

It has also been held to be culpable negligence, rendering one liable to a *bona fide* holder on an altered instrument, to write the whole or a part of the instrument with a pencil, where the alteration had been made by an erasure of the part which had been so written.[3] In previous sections, it has been explained that the acceptor of a bill is estopped from denying the genuineness of the signature of the drawer, but not of the contents of the bill;[4] that the trans-

54 Ohio St. 273 (43 N. E. 683); Gettysburg N. Bk. *v.* Chisolm, 169 Pa. St. 564 (32 A. 730); Derr *v.* Keough (Iowa), 65 N. W. 339; Middaugh *v.* Elliott, 1 Mo. App. 462; Farmers' & M. N. Bk. *v.* Novich (Tex.), 34 S. W. 914.

[1] Greenfield Sav. Bk. *v.* Stowell, 123 Mass. 196; (25 Am. Rep. 67); Holmes *v.* Trumper, 22 Mich. 427 (7 Am. Rep. 661); Washington Sav. Bk. *v.* Ekey, 51 Mo. 272. See Knoxville Nat. Bk. *v.* Clark, 51 Iowa, 264; (33 Am. Rep. 129; 1 N. W. 491).

[2] Angle *v.* N. W. &c. Ins. Co., 92 U. S. 530; Scholfield *v.* Londesborough, 2 Q. B. 660; Redlich *v.* Doll, 54 N. Y. 237 (13 Am. Rep. 573); Brown *v.* Reed, 79 Pa. St. 370 (21 Am. Rep. 75); Gettysburg N. Bk. *v.* Chisolm, 169 Pa. St. 564 (32 A. 730); Yocum *v.* Smith, 63 Ill. 321 (14 Am. Rep. 120); Blakey *v.* Johnson, 13 Bush, 197 (26 Am. Rep. 254); Cason *v.* Grant Co. Dep. Bk. (Ky.), 31 S. W. 40; Rainbolt *v.* Eddy, 34 Iowa, 440 (11 Am. Rep. 152); Derr *v.* Keough (Iowa), 65 N. W. 339; Paramore *v.* Lindsley, 63 Mo. 63; Winter *v.* Pool, 104 Ala. 580 (16 So. 543); Vischer *v.* Webster, 8 Cal. 109.

[3] Hervey *v.* Smith, 55 Ill. 224; Seibel *v.* Vaughan, 69 Ill. 257. See Zimmerman *v.* Rote, 75 Pa. St. 188; Elliott *v.* Levings, 54 Ill. 213, where a material clause is so negligently affixed as that it may be easily removed.

[4] See *ante*, § 72.

ferrer and indorser, alike, warrant the genuineness and validity of every part of the instrument which has been transferred or indorsed;[1] and that any party to a bill or note, whether a primary or secondary obligor, may be estopped from setting up the defense of forgery or invalidity from any cause, as against a *bona fide* holder, who has taken the paper in reliance upon the assurance of such a party, that it is free from the taint of suspected illegality or invalidity.[2] By a reference to these preceding sections, it becomes unnecessary to do more in the present connection than to refer the student to the cases, in which forgery was the particular ground of defense to an action on the instrument by a *bona fide* holder, and which was successfully set aside by the claim of an estoppel.[3]

§ 156. **Recovery of money paid on a forged bill or note.**— In conformity with the general rule of law, that money paid under a mistake of fact may be recovered back, any party to a forged bill or note may recover back from the party receiving it the money which has been paid under the mistaken belief in its genuineness, providing there has been no culpable delay in giving notice of the discovery of forgery. The general rule in this country requires that notice must be given, and demand made, within a reasonable time after the discovery of the forgery or alteration. This rule applies to checks, as well as to bills and notes, and whether there are any indorsers or not.[4] Where the

[1] §§ 76, 84.

[2] § 100.

[3] Leather Man. Nat. Bank *v.* Morgan, 117 U. S. 96; Wellington *v.* Jackson, 121 Mass. 157; Wilson *v.* Law, 112 N. Y. 536 (20 N. E. 399); Shisler *v.* Van Dyke, 92 Pa. St. 447 (37 Am. Rep. 702); West Phila. N. Bk. *v.* Field, 143 Pa. St. 473 (22 A. 829); Casco Bk. *v.* Keene, 53 Me. 103; Workman *v.* Wright, 33 Ohio St. 405 (31 Am. Rep. 546); Rudd *v.* Matthews, 79 Ky. 479 (42 Am. Rep. 231); Dow *v.* Spenny, 29 Mo. 386; Woodruff *v.* Munroe, 33 Md. 146.

[4] Gloucester Bk. *v.* Salem Bk., 17 Mass. 33; Welch *v.* Goodwin, 123 Mass. 71 (25 Am. Rep. 13); United States *v.* Onondaga Co. Sav. Bk., 39 Fed. 259; Allen *v.* Fourth Nat. Bk., 59 N. Y. 12; Welsh *v.* German Am. Bk., 73 N. Y. 424 (29 Am. Rep. 175); Ellis *v.* Ohio L. Ins. Co., 4 Ohio St. 628; Stratton *v.* McMakin, 84 Ky. 641 (renewal note a forgery as to

instrument is a complete forgery in every part, it need not be returned with the demand for repayment of the money, which has been paid on it; but if there are some genuine signatures on it, or in the case of alteration of the body of the instrument, it must be returned, so that the transferrer or indorser, who is to make the payment of the consideration, may have the means of enforcing whatever rights of action he may have on the instrument against others.[1] And if the holder is in possession of any collateral security, he can be required to surrender it, or account for its disappearance.[2]

ILLUSTRATIVE CASES.

Little Rock Trust Co. *v.* Martin, 57 Ark. 277 (21 S. W. 468).
Ryan *v.* First Nat. Bank of Springfield (35 N. E. 1120).
Citizen's Nat. Bank *v.* Importers' and Traders' Bank, 119 N. Y. 195 (23 N. E. 540).

Inserting a Rate of Interest, where None Had Been Agreed Upon, is a Material Alteration Which Avoids the Note.

Little Rock Trust Co. *v.* Martin, 57 Ark. 277 (21 S. W. 468).

BATTLE, J. This was an action on a note in the following words and figures:—

"Saline Co., Ark., January 17th, 18—. On or before the first day of November, 1889, I promise to pay L. Cahill & Co. or bearer seventy dollars, at Bank of Little Rock; value received. If paid at maturity, interest at eight per cent from November 1, 1889; but, if not paid when due, interest at ——— per cent per annum from date until paid. No promise or contract outside of this note will be recognized. [Signed] S. R. Martin, J. W. Huey."

The defense was, the note had been materially altered since it was executed. The second sentence in the note, as executed,

one party suit on original note allowed); Third Nat. Bank. *v.* Allen, 59 Mo. 310; Baldwin *v.* Threlkeld, 8 Ind. App. 312 (34 N. E. 851); Fraker *v.* Little, 24 Kan. 598 (36 Am. Rep. 262); City Bank *v.* First Nat. Bank, 45 Tex. 203.

[1] Brewster *v.* Burnett, 125 Mass. 68 (28 Am. Rep. 203); Smith *v.* McNair, 19 Kan. 330 (27 Am. Rep. 117). See United States *v.* Onondaga Co. Sav. Bk., 39 Fed. 259.

[2] First Nat. Bk., *v.* Wolff, 79 Cal. 69 (21 P. 551).

read as follows: "If paid at maturity, interest at ——— per cent from November 1, 1889; but, if not paid when due, interest at ——— per cent per annum from date until paid." It was altered to read: "If paid at maturity, interest at eight per cent from November 1, 1889; but, if not paid when due, interest at ——— per cent per annum from date until paid."

The defendants recovered judgment, and the plaintiff appealed.

Appellant insists that the alteration of the note had no legal effect, and was therefore immaterial. It is said in its abstract that this was the only issue. Was the legal effect of the note affected by the alteration?

Allowing days of grace, the note was due on the 4th of November, 1889. If paid at maturity, the note, as executed, bore no interest, but, as altered, 8 per cent per annum from the 1st of November, 1889, until the 4th of the same month. Wheeless *v.* Williams, 62 Miss. 369; Bank *v.* Wager, 2 Cow. 712. The difference is slight, but the maxim, "de minimis non curat lex," is not applicable to cases like this. The alteration made the note void. Craighead *v.* McLoney (Pa.), 14 Cent. Law J. 192; Stephens *v.* Graham, 7 Serg. & R. 505; Kennedy *v.* Bank, 18 Pa. St. 347. Affirmed.

Immaterial Alteration does not Constitute a Forgery, and does not Invalidate the Instrument.

Ripley *v.* First Nat. Bank of Springfield, 148 Ill. 349 (35 N. E. 1120).

Wilkin, J. This is an action of assumpsit by appellee against appellants, begun in the circuit court of Sangamon county. It has been tried three times in that court, and as often heard in the appellate court of the third district. The last judgment of the circuit court was for plaintiff for the amount of the note sued on, which has been affirmed by the appellate court. On August 30, 1884, appellants J. F. Ryan and W. J. Reilly contracted with one P. P. O'Donnell for the purchase of certain chattel property, agreeing to pay him therefor $4,200. They executed their promissory note of that date for the sum, payable to the order of "The First National Bank of Springfield" (appellee), due 90 days after date, and obtained the signatures thereto of Maggie Ryan and Mary Reilly as sureties. The evidence tends to show, and for the purposes of this opinion the fact is accepted as settled, that it was understood by the makers of this note and O'Donnell that by delivering it to the bank the money would be realized with which to pay for the goods purchased. After it was signed by all the makers, J. F. Ryan and W. J. Reilly took it, and shortly afterwards handed it to O'Donnell. The three then went to the bank, expecting to discount it, and get the cash. The cashier, however, declined to take it without the indorsement of O'Donnell, who, after some hesitancy, consented to do so. Instead of signing his name upon the back of the paper, he wrote

it at the foot of the note, after the signatures of the makers. The bank then discounted it to the amount of interest it called for for the 90 days, $86.40, O'Donnell insisting that he was to have the full amount of $4,200. Ryan and Reilly went out and got the $86.40, and paid it to the bank. It thereupon placed to the credit of O'Donnell $4,200 and the parties left, Ryan and Reilly immediately taking possession of the goods purchased. In a few minutes O'Donnell returned to the bank, and told the cashier that his name should have been signed on the back of the note, that he did not want to be a party to it as a maker. The cashier told him it made no difference as to his liability, but he insisted upon having it changed, and the cashier finally erased his signature at the foot of the note, wrote his name before the words, "The First National Bank of Springfield," and placed the bank's guaranty stamp on the back, which O'Donnell signed. It thus appears that, as originally written, the note was payable to appellee, signed by appellants. As first changed, it appeared to be payable to appellee, signed by appellants and O'Donnell, but it was in fact payable to appellee, signed by appellants, and indorsed by O'Donnell. As last changed it was made payable to O'Donnell, but simultaneously indorsed and guarantied by him to appellee. On each of the trials below the defense relied upon was that the note had been so altered after its execution, without the consent of the makers, as to discharge them from all liability upon it, and the only substantial question before us for decision is whether or not, on the facts above stated, that defense was made out.

The last trial was upon a declaration containing a special count, describing the note as originally made, and the common counts. The note was offered in evidence as finally changed, and the defendants objected. The objection was overruled, and this appellants insist was error. The execution of the note was proved, and it is clear that, if it was not rendered invalid by alterations, it was admissible under the common counts. Boxberger *v.* Scott, 88 Ill. 477. Recurring, then, to the principal question, it seems to be well settled that, while the general rule is that the unauthorized alteration of a contract by a party to it renders it void, the rule has been so far relaxed, at least in this country, that such an alteration, even though made by a party to the contract, will not destroy its validity, unless the alteration is found to be material. 2 Pars. Cont. 720. As expressed by Mr. Daniel in his work on Negotiable Instruments, Vol. 2, p. 359): Not every change in a bill or note amounts to an alteration. If the legal effect be not changed, the instrument is not altered, although some change may have been made in its appearance, either by the addition of words, which the law would imply, or by striking out words of no legal significance." This court said in Vogel *v.* Ripper, 34 Ill. 106: "The effect of an alteration in a written instrument depends upon its nature, the person by whom, and the intention with which it was made. If neither

the rights or interest, duties or obligations of either of the parties are in any manner changed, an alteration may be considered as immaterial." The controlling question, then, in this case is, were the changes made in the note sued upon, or either of them, material, within the meaning of the law? As shown by the authorities already cited, a change, to be material, must in some way affect the legal rights of the parties as they were expressed before the change was made. Daniel says, citing Holland *v.* Hatch, 15 Ohio St. 464: "And in no case is a change in the phraseology of the instrument material when it does not essentially change its legal effect." See, also, Pars. Bills & N. 560. It is also competent, in determining whether a change has materially affected the rights of the parties, to take into consideration their intention when the agreement was executed. Thus the date of a note may be changed so as to make it correspond with the intention of the parties without affecting its validity. Duker *v.* Franz, 7 Bush 273; Hervey *v.* Harvey, 15 Me. 357; Pars. Bills & N. 569, 570. In Ames *v.* Colburn, 11 Gray, 390, Metcalf, J., said: "The alteration of the date of the note was made by the promisee, without the knowledge or express consent of the promisor, but, as the arbitrator has found that it was made without any fraudulent intention, and merely to correct a mistake, and make the note such as both parties intended it should be, and understood it was, we are of opinion, upon the authorities, that the note was not vacated by the alteration, and the plaintiff is entitled to judgment on the award." In Derby *v.* Thrall, 44 Vt. 413, the defendant was surety on a note payable to the plaintiff. Through a mistake the plaintiff's given name was wrongly written in the body of the note, and he, after it was delivered to him, with the consent of the principal maker, but without the knowledge or consent of the defendant, changed the name of the payee so as to correct the mistake, and it was held the alteration was not material in the sense of invalidating the instrument. As originally written it was payable to Franklin Derby. By the change it was made payable to Francis E. Derby. The court said: "The change made no alteration in the liability or obligation of the maker. There was no change in the party to whom the obligation was assumed. The only effect of the alteration was to correctly describe the party to whom the promise was in fact understandingly made." The reasoning applies with full force to this case. It is not denied that it was the intention of appellants, when they executed the note, to obligate themselves to pay "to the order of 'The First National Bank of Springfield, Illinois.'" That was the language of their contract. That they are being called upon by this action to pay to a different person or company is not pretended. The change of the payee and the indorsement and guaranty, had, therefore, no other effect than to carry out the intention of the parties when they signed the note.

But, aside from the question of intention, we are unable to see

how the legal liability of the makers was changed. It is too clear for argument that the placing of the name of O'Donnell at the foot of the note was, in the light of the attending facts, no change whatever. He was requested to indorse the note, and he signed his name for that purpose, and no other. While the word "indorse," means a writing on the back, it can always be shown that a signature on the face of an instrument was placed there not as a maker, but for the purpose of binding the party as indorser only. Herring *v.* Woodhull, 29 Ill. 92. The legal effect, then, of O'Donnell signing his name on the face of the paper as indorser was precisely the same as though he had signed it on the back, and no one could pretend that the latter would have amounted to an alteration of the instrument. If he had signed it upon the back in the first place, not being the payee, the bank could have written over his signature just such a guaranty as now appears over it, and the rights of all the parties would have been just the same as they now are. A third party indorsing a note becomes liable as a guarantor. Camden *v.* McKoy, 3 Scam. 437; Boynton *v.* Pierce, 79 Ill. 145. Clearly such an indorsement would have been legitimate, and in no sense an alteration.

It only remains, therefore, to be determined whether making the note payable to O'Donnell instead of the bank, and at the same time assigning it back to it with the guaranty, changed "the rights or interests, duties or obligations of either of the parties." Was the legal effect of the obligation, as between the bank and the makers, thereby essentially changed? As originally made, it would have been the duty of the makers to pay the bank $4,200 at the expiration of 90 days. How can it be said that that duty was either enlarged or diminished by the change? The rights and duties of the bank, as between it and the makers, were precisely the same after as before the change. True, it had also the guaranty of O'Donnell, but that it had a right to obtain without reference to the change made in the payee. His guaranty neither enlarged nor diminished the rights of the banks against appellants. Counsel say O'Donnell became the indorser, and not the guarantor of the note; that, being only an indorser, the bank was required to take prompt action to enforce payment from the makers, in order to hold him liable, and in this way they say the makers were deprived of "the right to indulge the presumption that the note would be carried if desired." The right would be a most precarious one even on the position assumed, but the complete answer to the argument is the fact that by the express terms of the indorsement O'Donnell became a guarantor, and not a mere indorser. The language of the indorsement is: "For value received, I hereby guaranty the payment of the within note at maturity," etc. Cases are cited in which it was held that changing name of the payee in a promissory note was a material alteration. With those cases we find no fault whatever. They were decided upon a state of facts which showed that the change would or

might have resulted in imposing other duties and obligations upon the parties.

It seems to be thought that the fact that two of the makers of this note signed it as securities should affect the decision of the case. We do not think so. On this record, if the change amounted in law to a material alteration of the note, all the makers were discharged; if material, the obligation of the sureties is in no way changed.

Whatever may be said as to the propriety of the conduct of the cashier of the bank, when tested by the rules of business, it clearly appearing that no wrong was intended, and there being nothing in the record to show that appellants would have been or could have been injured by that conduct, we are of the opinion that the validity of the note was not destroyed.

The rulings of the circuit court as to the competency of evidence and in giving and refusing instructions were in conformity with this view, and to follow counsel in their argument on that branch of the case would be but to repeat what we have already said. The judgment of the appellate court will be affirmed.

Liability of Drawee Bank on Check which has been Paid on Forged Indorsements.

Citizens' Nat. Bank *v.* Importers' and Traders' Bank, 119 N Y. 195 (23 N. E. 540).

Appeal from supreme court, general term, first department.

This action was commenced by the plaintiff, a bank in the State of Iowa, to recover against the defendant, a bank in New York city, on the ground of the non-payment of certain drafts or bills of exchange which plaintiff had drawn upon the defendant in favor and to the order of Wadsworth & Co. The complaint alleges, in 10 counts, the making and delivery of the drafts, their indorsement by the payees, a presentation and demand for payment, the defendant's refusal, and its protest for non-payment thereof; that at the time of defendant's refusal to pay the plaintiff had sufficient funds on deposit with defendant wherewith to pay the drafts; and that by reason of the non-payment the plaintiff has been compelled to pay the amount of the drafts, and to take them up. The form of the drafts was as follows, viz.: "$3,269.65. State of Iowa. No. 232,245. The Citizens' National Bank of Davenport. Davenport, April 7, 1884. Pay this first of exchange, second unpaid, to the order of W. C. Wadsworth & Co., thirty-two hundred sixty-nine 65-100 dollars, in current funds. E. S. Carl, Cashier. To Importers' and Traders' National Bank, New York." The defense set up in the answer was the payment of the described paper to the Fourth National Bank, as the holder thereof through various indorsements. The answer admitted the possession by defendant of sufficient deposits from the plaintiff to

pay all of the paper. Upon the trial these facts were developed: W. & Co. bought these drafts from the plaintiff bank in order to remit to their creditors in payment of sundry accounts, and, having appropriately indorsed them, delivered them to their bookkeeper, to be sent off. He, however, erased the indorsements, and forged others, and used the paper for his own purposes. It thereby came into other hands, and through the Fourth National Bank was presented to and paid by the defendant. Against the plaintiff's proofs establishing the forgeries, through which the paper was diverted from the uses ordered by W. & Co., the defendant offered nothing in disproof. After the forgeries were discovered, and upon the return to the plaintiff of the drafts from the defendant, W. & Co. demanded and obtained them back from the plaintiff, and indorsed them to one W. for collection. He was refused payment of them by the defendant on their presentation; the defendant's cashier placing the refusal on the ground of their previous payment. W. then returned them to the payees, W. & Co. The plaintiff repaid to W. & Co. the moneys wherewith the drafts had been purchased by them, and then commenced this action.

Gray., J. (after stating the facts as above). The form of the complaint is, perhaps, technically open to a criticism that it seems to ground the action upon the drafts themselves, and therefore makes it one to recover plaintiff's deposits. Such a cause of action has not accrued to the plaintiff at all, upon the facts in this record. The cause of action which is stated to have accrued to plaintiff was for the refusal of the defendant to honor the plaintiff's drafts upon it. The contract between the two banks, as implied by law, was that the amount of funds standing to the credit of the plaintiff bank on the defendant's books should be held and paid out upon and according to the plaintiff's checks or order; and a failure to obey an order for their payment was a breach of the defendant's duty and contract, for which it is legally liable, either in tort or upon the contract. In this case the breach of contract occurred upon the refusal to pay the plaintiff's drafts upon its funds to the order of the payees named, and a cause of action then arose in plaintiff's favor. But this criticism upon the form of the complaint is not serious in its results; for the pleading may be upheld, and the action maintained as one simply for the breach of the defendant's contract to pay the drafts of the plaintiff. Code Civil Proc., § 481, requires that a complaint shall contain a plain and concise statement of the facts constituting the cause of action; and that requisite is met here sufficiently. The pleading, after describing the drafts, and stating the proceedings up to protest for non-payment, alleges "that at the time said defendant so neglected and refused to pay, * * * plaintiff had sufficient money or funds on deposit with the defendant to its credit, and subject to its draft or order, wherewith to pay, * * * and that by reason of the non-payment the plaintiff has been

compelled to pay, and has paid, the amount," etc. That is a plain statement of the facts, from which, as a legal conclusion, the plaintiff's legal right to recover is deducible, and the defendant could in nowise be misled. This seems especially true; for by its answer the defendant admits that it was indebted to the plaintiff for moneys theretofore deposited subject to its draft, check, or order in more than a sufficient sum to pay all the drafts; and it relies, to defeat the action, upon the defense of payment only. As to the cause of action, I think it clearly one which did accrue to, and became enforceable by, the plaintiff. In the first place, we must regard the paper as never having been paid by defendant to the order of the plaintiff; for the rule is well and long established that a forged indorsement does not pass a title to commercial paper, negotiable only by indorsement; and payment by the drawee, although in good faith, of a draft so affected, is no payment at all, as to the true owner. Graves *v.* Bank, 17 N. Y. 205.

It was the defendant's business to see to it that its depositor's moneys were expended according to its directions; and every expenditure was at the defendant's risk of the direction being valid, and the indorsement conveying title to the holder genuine. Corn Exchange Bank *v.* Nassau Bank, 91 N. Y. 74, 81.

The defendant made no attempt to disprove the plaintiff's evidence as to the forged indorsements of the payees' names and orders, and the forgeries must be taken as proved. Forgeries may consist, in the legal sense, of any fraudulent alteration of paper by which another may be defrauded. Chit. Bills, 781. So we have no payment by the defendant of these drafts proved; and the question becomes solely one upon its objection to the right of the plaintiff to maintain this action for non-payment by the defendant, to third persons, of the drafts. Its counsel says the proper remedy was to sue for the deposits. That is not so. Here the cause of action is the breach of the implied and concealed contract to pay out the plaintiff's funds according to its drafts and order. The remedy was to sue for the breach, and to recover against the defendant in an amount equal to the amount of the plaintiff's drafts which were refused payment. That the plaintiff repaid to W. & Co. the moneys they had paid to it to obtain these drafts, and thereby reacquired the paper, is wholly immaterial as long as the action is not upon the drafts themselves. If the plaintiff was suing upon this paper through a derivative title from W. & Co., it would be a very different question indeed. But the payment back of the moneys to W. & Co. established the damage, and its extent, to which the defendant's act subjected the plaintiff. The acquisition thereby, and the holding and exhibition, of the dishonored drafts, are evidences of the facts constituting the cause of action. In recent cases this court has passed upon similar questions as to the rights of drawers of checks, to which we may in fact liken this paper. In Bank of British N. A. *v.* Merchants' Nat. Bank, 1 N. Y. 111, the case shows the payment

by the defendant bank of a check given by the plaintiff bank to H., and made payable to her order. Her indorsement was forged, and the money collected by another person. When the facts of the forgery and of the payment were discovered, the action was commenced. It is true the only defense was the statute of limitations; but Earl, J., in his opinion, which was concurred in by all the judges, said: "When the defendant paid the check upon the forged indorsement, it paid its own money, and discharged no part of its indebtedness to the plaintiff. * * * The plaintiff lost none of its rights by receiving, under a mistake as to the facts, the check as one properly paid and charged to its account by the defendant." But later, in the case of Viets *v.* Bank, 101 N. Y. 563; 5 N. E. Rep. 457, this rule was laid down, that "the refusal to pay on presentation of the check, which presentation is equivalent to a demand of payment, gives to the drawee a right of action, in case he has funds in the bank to meet the check, and the refusal to pay is without his authority."

This doctrine, I find, has the distinct support of a decision of the king's bench in the case of Marzetti *v.* Williams, 1 Barn. & Adol. 415. That was an action by the drawer of a check against his bankers for failing to pay it to the payees named therein on presentation. The dishonor was through some inadvertence of the bankers; and, as matter of fact, the check, being presented the next day, was then paid. Lord Tenterden held that the action was maintainable as one founded on the bankers' implied contract with his customer that he will pay checks drawn by him, provided he has moneys of the customer, and a breach of that contract was created when the defendants would not pay the check. Nominal damages were awarded the plaintiff in that case, though he might not have sustained a damage in fact. Justices Parke, Taunton, and Patterson agreed with Lord Tenterden, holding that it was immaterial whether the action was, in form, tort or *assumpsit*. The rule is well supported in principle as by the authorities, and governs this case. The damage to the plaintiff here was not merely nominal, for the dishonor of its drafts, but actual, for the amount presented by them, and which the plaintiff had to make good to the payees.

There is but one other question which I think calls for further consideration, and that is as to the exclusion of certain evidence which the defendant sought to elicit from the witness Wadsworth. By a question to that witness, who was one of the payees of the drafts, defendant endeavored to prove that when the plaintiff paid back to Wadsworth & Co, the moneys for the drafts which had been dishonored they had settled with their bookkeeper, and for this indebtedness to them, including the appropriation by him of these drafts, had received certain property. In support of their right to make this proof, they argued that if W. & Co. had made a settlement with their bookkeeper they were not in any condition to demand back the drafts which had been returned to the plaintiff by the defendant as paid, and

if plaintiff redelivered the drafts to them, under such a state of facts, it acted in its own wrong, and the defendant would not be liable. Without discussing the features of such a case, it is sufficient to say that there are two good reasons for the exclusion of the evidence. In the first place, no such defense was set up by the answer, nor did that pleading contain any allegation which would raise any other issue than the issue of payment. In the next place, the question, if answered according to its tenor, would not elicit any proof that W. & Co. had been paid. It called for the witness' testimony as to whether his firm did not charge the book-keeper with the drafts, and then take from him various kinds of property "as security for this entire indebtedness, consisting of these checks in part; and did they not receive that property? and did they not collect something from it?" etc. But that they may have received some securities for his indebtedness would not establish the fact of a payment and extinguishment of any claim based on the purchase of the drafts which were dishonored. I think the action was rightly disposed of below; and the judgment appealed from should be affirmed, with costs. All concur.

CHAPTER XV.

THE RIGHTS AND LIABILITIES OF SURETIES AND GUARANTORS.

SECTION 157. Sureties and guarantors distinguished.
158. Form and requisites of a guaranty.
159. Guaranty as appurtenant to a bill or note.
160. Demand of principal debtor and notice of default, when necessary.
161. Concealed sureties as accommodation parties — Nature of their liability — Admissibility of parol evidence to prove real character.
162. What will discharge guarantors aud sureties — Surrender of securities and extension of time of payment.
163. Remedies of surety and guarantor — Coutribution between co-sureties.

§ 157. **Sureties and guarantors distinguished.**— The surety and guarantor both promise to answer for the debt of another; but their characters, and therefore their rights, are different, on account of the different relations they bear to the other parties, and to the original contract. A guarantor is one who, by independent agreement or contract, promises to answer for the debt, default or miscarriage of another, it matters not what may be the character of the contract or obligation, which is guaranteed. There may be a guaranty, strictly so-called, of a bill or note, as well as of any other executory contract. But, while it may be possible for one, in the strict sense of the term, to become a surety of any kind of contract, it is customary to confine the employment of the name to those who guarantee the payment of a bill, note, or other negotiable instrument, by becoming a regular party to the paper, whether as drawer or acceptor of a bill, the joint maker of a note or indorser of either. The surety's character as a guarantor is, so far as the holder of the bill or note is concerned, merged and lost in his character as a regular party to the

instrument. That is, he is either joint-maker of a note, drawer or acceptor of a bill, or indorser; and his rights, except as to the right of subrogation to collateral securities, held by the holder of the bill or note, are the same, as if he had not become a party to the instrument for the accommodation of the real debtor. All sureties are accommodation parties.[1]

But a guarantor is never a regular party to a bill or note. His obligation rests upon a separate collateral agreement. And the character of his obligation is not necessarily the same as that of a surety, although they both promise to pay the same debt of another.[2]

§ 158. **Forms and requisites of a guaranty.**— It is not required that the guaranty shall assume any particular form. It may be written on a separate piece of paper, or on or across the bill or note, whose payment is guaranteed. The guaranty may be absolute, or conditional upon the happening of some other contingency than the default of the principal debtor.[3] It may refer to past, present or future indebtedness, and it may be limited or unlimited in respect to the amount of the debt and the time of contract-

[1] Bank of U. S. *v.* Hatch, 6 Pet. 250; Wallace *v.* McConnell, 13 Pet. 136; Sayles *v.* Sims, 73 N. Y. 551; Benedict *v.* Olson, 37 Minn. 431 (35 N. W. 10); Raymond *v.* McNeal, 36 Kan. 471 (13 P. 814); National Pemberton Bank *v.* Lougee, 108 Mass. 371 (11 Am. Rep. 367); Arents *v.* Commonwealth, 18 Gratt. 750; Schmidt *v.* Archer, 113 Ind. 365 (14 N. E. 543; Blair *v.* Bank of Tennessee, 11 Humph. 83; Priest *v.* Watson, 7 Mo. App. 578; 75 Mo. 310 (42 Am. Rep. 409). It must, however, be remembered that there is a difference between a surety and a regular party to a bill or note, in that a surety becomes a regular party for the accommodation of another, and to lend his credit to the paper. See Trimble *v.* Thorne, 16 Johns. 152 (8 Am. Dec. 302); Beardsley *v.* Warner, 8 Wend. 613; Pollard *v.* Huff, 44 Neb. 892 (63 N. W. 58).

[2] It should be observed that guaranties will be discussed in these pages only so far as such discussion is necessary to explain the guaranties of bills and notes.

[3] Lanusse *v.* Barker, 3 Wheat. 101; Moakeley *v.* Riggs, 19 Johns. 69 (10 Am. Dec. 196); Curtis *v.* Smallman, 14 Wend. 231; Bishop *v.* Rowe, 71 Me. 263; Dickerson *v.* Derrickson, 39 Ill. 574; Allen *v.* Harrah, 30 Iowa, 363; Johnston *v.* Mills, 25 Tex. 704.

ing the debt, as well as to the number of debts whose payment is to be assured. Generally, where the singular number is employed in describing the debt to be guaranteed, as where one guarantees "any sum" not exceeding a certain amount, the guaranty does not cover more than one debt. But if the plural is employed, "any sum or sums," the guaranty will include all the debts which are contracted by the party guaranteed, as long as their aggregate amount does not exceed the limit imposed by the guaranty.[1]

Like all other contracts, a consideration must support a guaranty, in order that it may be enforced. If the guaranty is given contemporaneously with, or antecedent to, the negotiation of the bill or note which is guaranteed, the consideration of the bill or note will likewise support the guaranty, the consideration having been given in reliance upon the guaranty and the original promise.[2] But if the guaranty is given subsequent to the negotiation of the bill or note, there must be a fresh and independent consideration for such guaranty, unless the guaranty has been given subsequently in performance of a contemporaneous agreement to furnish it.[3]

Another requirement to the validity of a guaranty is that it shall be in writing, signed by the party to be charged.

[1] Douglass *v.* Reynolds, 7 Pet. 113; Lee *v.* Dick, 10 Pet. 482; Jordan *v.* Dobbins, 122 Mass. 168 (23 Am. Rep. 305); Gates *v.* McKee, 13 N. Y. 232 (64 Am. Dec. 545); Lockwood *v.* Crawford, 18 Conn. 361; Cremer *v.* Higginson, 1 Mason, 323; Greer *v.* Bush, 57 Miss. 575; Ranger *v.* Sergeant, 36 Tex. 26.

[2] Colburn *v.* Averill, 30 Me. 310 (50 Am. Dec. 630); Bickford *v.* Gibbs, 8 Cush. 154; Draper *v.* Snow, 20 N. Y. 331 (75 Am. Dec. 408); Snively *v.* Johnston, 1 Watts & S. 309; Wyman *v.* Goodrich, 26 Wis. 21; Lamb *v.* Briggs, 22 Neb. 138 (34 N. W. 217); Parkhurst *v.* Vail, 73 Ill. 343; Jones *v.* Kuhn, 34 Kan. 414 (8 P. 777); Highland *v.* Dresser, 35 Minn. 345 (29 N. W. 55); Star Wagon Co. *v.* Swezy, 63 Iowa, 520 (19 N. W. 298).

[3] Good *v.* Martin, 94 U. S. 90; Moies *v.* Bird, 11 Mass. 436 (6 Am. Dec. 179); Hawkes *v.* Phillips, 7 Gray, 284; Evansville Nat. Bk. *v.* Kaufman, 93 N. Y. 273 (45 Am. Rep. 204); Cowles *v.* Pick, 55 Conn. 251 (10 A. 569); Williams *v.* Williams, 67 Mo. 667; Sypert *v.* Harrison, 88 Ky. 461 (11 S. W. 435); Klein *v.* Currier, 14 Ill. 237; Farmer *v.* Perry, 70 Iowa, 358 (30 N. W. 752); Hungerford *v.* O'Brien, 37 Minn. 306 (34 N. W. 161).

This is an invariable provision of the Statutes of Frauds in the United States. There is, however, a difference of opinion as to what kind of writing satisfies the requirements of the statute. The courts are agreed that the signature of the party to be charged must be obtained. In some of the States, it is held that the writing must contain a statement of the consideration for the guaranty; not an explicit statement, but sufficient writing to show the foundation for the guaranty.[1]

There are, however, cases in other States which deny the necessity even of the acknowledgment in writing of a consideration for the guaranty, leaving the want of consideration to be shown by parol in defense of the action on the guaranty.[2] And in some of these latter courts, it is held that a simple signature of the guarantor, on some part of the original instrument of indebtedness, is a sufficient compliance with the requirements of the Statute of Frauds.[3]

But the obligation must in fact, as well as in form, be a promise to answer for the debt of others, in order that the

[1] Mayer *v.* Isaacs, 6 M. & W. 610; Douglass *v.* Reynolds, 7 Pet. 113 (A. "might require your aid from time to time," and I promise "to be responsible at any time for a sum," etc.); Cremer *v.* Higginson, 1 Mason, 323; Cowles *v.* Pick, 55 Conn. 251 (10 A. 569); Ordeman *v.* Lawson, 49 Md. 135; Union N. Bk. *v.* First N. Bk., 45 Ohio St. 236 (13 N. E. 884); Parsy *v.* Spikes, 49 Wis. 384 (35 Am. Rep. 782; 5 N. W. 794); Young *v.* Brown, 53 Wis. 333 (10 N. W. 394); Nichols *v.* Allen, 23 Minn. 543; Newton Wagon Co. *v.* Diers, 10 Neb. 84 (4 N. W. 995). In New York, by statute the existence of a consideration is required to be acknowledged in the writing. Douglass *v.* Howland, 24 Wend. 35; Draper *v.* Snow, 20 N. Y. 331 (75 Am. Dec. 408); Brewster *v.* Silence, 8 N. Y. 211.

[2] Packard *v.* Richardson, 17 Mass. 122 (9 Am. Dec. 123); Sage *v.* Wilson, 6 Conn. 81; Leonard *v.* Vredenburg, 8 Johns. 29 (5 Am. Dec. 317); Bailey *v.* Freeman, 11 Johns. 221 (6 Am. Dec. 371); Read *v.* Evans, 17 Ohio 128; Violett *v.* Patten, 5 Cranch, 142.

[3] Moies *v.* Bird, 11 Mass. 436 (6 Am. Dec. 179); Perkins *v.* Catlin, 11 Conn. 213 (29 Am. Dec. 282); Nelson *v.* Dubois, 13 Johns. 175; Pool *v.* Anderson, 116 Ind. 88 (18 N. E. 445). See Knaus *v.* Major (Mich. '97), 69 N. W. 489, as to the binding effect of a verbal warranty that a note is good when made by the holder. In many of the States such a signature on a bill or note, unexplained, would impose on the party signing the liability of an indorser. See *ante*, § 92.

statutory requirement of a writing should apply. And it has been held that if a debtor liquidates his own obligation by the transfer to his creditor of another's bill, note or check, verbally guaranteeing the payment of the negotiable paper so transferred, it is really a guaranty of the payment of his own debt, and is binding, although not reduced to writing.[1]

§ 159. **Guaranty as appurtenant to a bill or note.**— If the guaranty of a bill or note is written on a separate paper, it seems to be well settled that it will not pass as appurtenant of the bill or note to a subsequent transferee of the bill or note, unless the guaranty itself contains words of negotiability in describing the persons to whom payment of the principal obligation is guaranteed.[2] But where the guaranty is written on the bill or note without words of negotiability, the authorities are divided on the proposition that a subsequent holder of the bill or note may sue the guarantor; some holding the affirmative,[3] and others sustaining the negative.[4]

[1] Brown *v.* Curtis, 2 N. Y. 225; Cardell *v.* McNiell, 21 N. Y. 336; Milks *v.* Rich, 80 N. Y. 269 (36 Am. Rep. 615); Malone *v.* Keener, 44 Pa. St. 107; Hunt *v.* Adams, 5 Mass. 358 (4 Am. Dec. 68); Thurston *v.* Island, 6 R. I. 103; Huntington *v.* Wellington, 12 Mich. 10; Smith *v.* Finch, 3 Ill. 21; Collins *v.* Stanfield, 138 Ind. 184 (38 N. E. 1091); Sheldon *v.* Butler, 24 Minn. 513; Barker *v.* Scudder, 56 Mo. 272; Dyer *v.* Gilson, 16 Wis. 557.

[2] McLaren *v.* Watson's Ex'rs, 19 Wend. 557; 20 Wend. 425 (37 Am. Dec. 260); Barlow *v.* Myers, 64 N. Y. 41 (21 Am. Rep. 547). And see First National Bank *v.* Carpenter, 41 Iowa, 518.

[3] McLaren *v.* Watson's Ex'rs, 20 Wend. 425 (37 Am. Dec. 260); Cole *v.* Merchant's Bank, 60 Ind. 350; Gage *v.* Mechanics' Bk., 79 Ill. 62; Ellsworth *v.* Harmon, 101 Ill. 274; Robinson *v.* Lair, 31 Iowa, 9; Green *v.* Burroughs, 47 Mich. 70; Heard *v.* Dubuque Co. Bk., 8 Neb. 10 (30 Am. Rep. 811); Johnson *v.* Mitchell, 50 Tex. 212 (32 Am. Rep. 602). But see Jones *v.* Thayer, 12 Gray, 443 (74 Am. Dec. 602); Baldwin *v.* Dow, 130 Mass. 416.

[4] Trust Co. *v.* National Bank, 101 U. S. 68; Omaha Nat. Bk. *v.* Walker, 5 Fed. 399; Bissell *v.* Gowdy, 31 Conn. 47; Taylor *v.* Binney, 7 Mass. 479; Belcher *v.* Smith, 7 Cush. 482; Jones *v.* Dow, 142 Mass. 130 (7 N. E. 839); Northumberland Co. Bk. *v.* Eyer, 58 Pa. St. 97; and see Tinker *v.* McCauley, 3 Mich. 188.

§ 160. **Demand of principal debtor and notice of default to guarantor, when necessary.**— As has been fully explained in preceding sections,[1] one, who becomes responsible for the payment of a bill or note, as a drawer or indorser, guarantees its payment only upon the condition that the bill or note be presented to the acceptor or maker at the time of maturity, protest made for default and notice of dishonor given to such drawer or indorser. And if these conditions have not been complied with in every particular, unless there is a satisfactory excuse for the failure to so comply, the drawer or indorser is completely discharged from all secondary liability, even though it can be shown that no damage has resulted to him from the prompt performance of these conditions by the holder of the bill or note. And this is equally true, if the drawer or indorser has become a party to the paper for the accommodation of the principal debtor or other party to the paper, and is for that reason properly described as a surety. But where one guarantees the payment of a bill or note, without bringing himself into the classification of sureties, *i. e.*, without making himself a drawer or indorser of the bill or note, unless an express condition is attached to his guaranty, he can be held liable on his guaranty for the default of the primary obligor of the bill or note, even though demand of payment and notice of dishonor have not been made in strict accordance with the requirements of the law of negotiable paper. In any case, the guarantor is liable, if demand has been made of the primary obligor, and notice of default sent to the guarantor, within a reasonable time after maturity.[2] And even this more or less lax require-

[1] See §§ 84, 130.

[2] Douglass *v.* Reynolds, 7 Pet. 126; Talbot *v.* Gay, 18 Pick. 535; Cowles *v.* Pick, 55 Conn. 251 (10 A. 569); Cromwell *v.* Hewitt, 40 N. Y. 491 (100 Am. Dec. 527); Clay *v.* Edgerton, 19 Ohio St. 549 (2 Am. Rep. 422); Dickerson *v.* Derrickson, 39 Ill. 577; Parkhurst *v.* Vail, 73 Ill. 343; Greene *v.* Thompson, 33 Iowa, 293; Rodabaugh *v.* Pitkin, 46 Iowa, 544; Montgomery *v.* Kellogg, 43 Miss. 486 (5 Am. Rep. 508); Newton Wagon Co. *v.* Diers, 10 Neb. 285 (4 N. W. 995). Wright *v.* Dyer, 48 Mo. 525.

ment of a demand and notice of default is not an absolute condition precedent to the liability of the guarantor. It seems to be a settled proposition of law that the guarantor can be held liable in case of default of the primary obligor without proof of previous demand and notice of default; unless it can be shown that the guarantor has suffered joint damage by the failure of the holder to notify the guarantor of the default, within a reasonable time after maturity of the obligor. For example, the guarantor is liable, notwithstanding the want of notice, if the principal was insolvent at and before maturity of the bill or note, because it is presumed that the guarantor has suffered nothing in that case from the failure to give notice of the default.[1]

§ 161. **Concealed sureties as accommodation parties — Nature of their liability — Admissibility of parol evidence to prove real character.**— If the accommodation party to commercial paper, whether he be drawer or acceptor of a bill, maker of a note, or indorser of either, affixes the word *surety* to his signature, he must undoubtedly be treated as surety by all the subsequent holders of the paper.[2]

But whether his real character as surety can be shown by parol evidence, where it has been concealed or at least not disclosed in the bill or note, is differently decided by the different courts; and the ruling is different, according to the effect of the disclosure of the real character of the party as surety on the rights of the other parties to the instrument. If a concealed surety appears as a regular acceptor or indorser, while a few cases in the United States hold to the English equitable rule that parol evidence is

[1] Reynolds *v.* Douglass, 12 Pet. 497; Louisville Mfg. Co. *v.* Welch, 10 How. 461; Oxford Bank *v.* Haynes, 8 Pick. 423 (19 Am. Dec. 334); Breed *v.* Hillhouse, 7 Conn. 523; Brown *v.* Curtis, 2 N. Y. 225; Allen *v.* Rightmere, 20 Johns. 365 (11 Am. Dec. 288); Hance *v.* Miller, 21 Ill. 636; Voltz *v.* Harris, 40 Ill. 155; Hungerford *v.* O'Brien, 37 Minn. 306 (34 N. W. 161); Wright *v.* Dyer, 48 Mo. 525; Fuller *v.* Scott, 8 Kan. 25.

[2] Hunt *v.* Adams, 5 Mass. 358 (4 Am. Dec. 68); Sayles *v.* Sims, 73 N. Y. 551; Culbertson *v.* Wilcox, 11 Wash. St. 522 (39 P. 954).

admissible to prove the party's character as surety, as against all parties who know the fact (but not as a *bona fide* holder);[1] the great weight of judicial opinion follow the English common law rule, which permits the subsequent holder of a bill or note to treat all the prior parties according to their ostensible character, and deny the admissibility of parol evidence to prove their real character, where it would completely change the character of a party to the paper.[2] But it seems that, if the concealed surety appears as a joint maker or drawer, so that proof of his character as surety would not reverse the ostensible relations of the parties, the general trend of judicial opinion in this country permits the proof of his real character by parol evidence, with the accompanying modification of the rights of the parties.[3]

§ 162. **What will discharge guarantors and sureties — Surrender of securities and extension of time of payment.**— In explaining what will discharge guarantors and sureties, it must always be borne in mind, that where the character of a surety is concealed by his appearance as a regular party to a bill or note, his rights and his liabilities, as against a *bona fide* holder, are determined by his osten-

[1] Guild *v.* Butler, 127 Mass. 386; Rand *v.* Cutler, 155 Mass. 451 (29 N. E. 1085); First Nat. Bk. *v.* Gaines, 87 Ky 597 (9 S. W. 396); Cone *v.* Rees, 11 Ohio C. C. 632; Meggett *v.* Baum, 57 Miss. 22; Benedict *v.* Olson, 37 Minn. 431 (35 N. W. 10); Stump *v.* Richardson Co. Bk., 24 Neb. 522 (39 N. W. 423).

[2] Harris *v.* Brooks, 21 Pick. 195 (32 Am. Dec. 254); White *v.* Hopkins, 3 Watts & S. 99 (37 Am. Dec. 542); Bk. of Montgomery *v.* Walker, 9 Serg. & R. 229 (11 Am. Dec. 709); *s. c.* 12 Serg. &. R. 382; Stephens *v.* Monongahela, 88 Pa. St. 157 (32 Am. Rep. 438); Clopper's Adm'r *v.* Union Bk., 7 Har. & J. 92 (16 Am. Dec. 294); Lambert *v.* Sandford, 2 Blackf. 137 (18 Am. Dec. 149); DeWitt *v.* Boring, 123 Ind. 4 (23 N. E. 1085); Yates *v.* Donaldson, 5 Md. 389 (61 Am. Dec. 283); Scott *v.* Taul (Ala. '97), 22 So. 447; Cronise *v.* Kellogg, 20 Ill. 11; Culbertson *v.* Wilcox, 11 Wash. St. 522 (39 P. 954).

[3] Hubbard *v.* Gurney, 64 N. Y. 457; Sayles *v.* Sims, 73 N. Y. 551; Barron *v.* Cady, 40 Mich. 259; Goodman *v.* Litaker, 84 N. C. 8 (37 Am. Rep. 602); Stillwell *v.* Aaron, 69 Mo. 539 (33 Am. Rep. 517); Irvine *v.* Adams, 48 Wis. 468 (33 Am. Rep. 817).

sible, rather than his real, character. Of course, it is not possible for the guarantor, as distinguished from a surety, to masquerade in any other character.

In the first place, whatever discharges the principal debtor, will likewise discharge the guarantor and surety; whether it be a payment, release, or the successful establishment of a defense to an action on the bill or note, such as illegality or fraud.[1]

In the second place, the guarantor or surety will be discharged from liability, if his signature has been procured by fraud or misrepresentation, or the bill or note has been diverted from its expressed purpose, or its terms altered in any material degree, with or without the cognizance of the principal debtor. These defenses, however, will not avail the guarantor or surety as against a *bona fide* holder.[2]

Finally, the guarantor or surety is discharged, if the holder surrenders to the principal debtor or other party to the paper collateral securities, which he holds as security for the guaranteed debt; or enters into a binding contract for the extension of the time of payment, without the consent of such guarantor or surety. Under the principle of

[1] Durham *v.* Giles, 52 Me. 206; Sargent *v.* Appleton, 6 Mass. 85 (4 Am. Dec. 90); Day *v.* Jones, 150 Mass. 231 (22 N. E. 898); Couch *v.* Waring, 9 Conn. 261; Putnam *v.* Schuyler, 4 Hun, 166 (but see McWilliams *v.* Mason, 31 N. Y. 294); Storer *v.* Milliken, 85 Ill. 218; Griffith *v.* Sitgreaves, 90 Pa. St. 161; Aultman & Taylor Co. *v.* Hefner, 67 Tex. 54 (2 S. W. 861); Eggemann *v.* Henschen, 56 Mo. 123. But see Carver *v.* Steele, 116 Cal. 116 (47 P. 1007), where it is held that loss of remedy against maker of a note does not discharge a surety. And so, also, a surety is nevertheless liable, although the principal is a married woman, and she successfully sets up the defense of want of legal authority to make a contract. Davis *v.* Staits, 43 Ind. 103 (13 Am. Rep. 382); Sample *v.* Cochran, 82 Ind. 260; Allen *v.* Berryhill, 27 Iowa, 534 (1 Am. Rep. 309).

[2] Harris *v.* Brooks, 21 Pick. 195 (32 Am. Dec. 254); Packard *v.* Herrington, 41 Kan. 469 (21 P. 621); Owens *v.* Tague, 3 Ind. App. 245; Johnson *v.* Mitchell, 14 Colo. 227 (23 P. 452); Anderson *v.* Warne, 71 Ill. 20 (22 Am. Rep. 83); Petefish *v.* Watkins, 124 Ill. 384 (16 N. E. 248); North Atchison Bk. *v.* Gay, 114 Mo. 203 (21 S. W. 479); St. Louis Nat. Bk. *v.* Flanagan, 129 Mo. 178 (31 S. W. 773); Melick *v.* First Nat. Bk., 52 Iowa, 94 (2 N. W. 1021); Galbraith *v.* Townsend, 1 Tex. Civ. App. 447; 20 S. W. 943; Merchants' Exch. Bk. *v.* Luckow, 37 Minn. 542 (35 N. W. 434).

subrogation, the guarantor or surety has a vested interest in the collateral security, which cannot be jeopardized or destroyed without his discharge from his liability.[1] But, unless the holder of a bill or note has agreed to use due diligence in suing the principal, or there is a statute requiring it, mere delay in suing the principal will not discharge the surety or guarantor, as long as the Statute of Limitations does not bar the cause of action.[2] The agreement for an extension of the time of payment must not only be based upon a valuable executed consideration of some sort,[3] but the agreement must be absolute and for an extension of payment for a definite period of time. It is not the length of time, but its definiteness which discharges the guarantor or surety.[4]

[1] Otis *v.* Van Storch, 15 R. I. 41 (23 A. 39); Hayes *v* Ward, 4 Johns. Ch. 123 (8 Am. Dec. 554); Paine *v.* Johnson, 76 N. Y. 274; Millerd *v.* Thorn, 56 N. Y. 402; Sloan *v.* Latimer, 41 S. C. 217 (19 S. E. 491); Freanor *v.* Yingling, 37 Md. 491; Galbraith *v.* Townsend, 1 Tex. Civ. App. 477; Holland *v.* Johnson, 51 Ind. 346; Barrett *v.* Davis, 104 Mo. 549 (16 S. W. 377); Kirkpatrick *v.* Howk, 80 Ill. 122; Dillon *v.* Russell, 5 Neb. 484. But see Sheehan *v.* Taft, 110 Mass. 331.

[2] Berry *v.* Pullen, 69 Me. 191 (31 Am. Rep. 248); Salt Springs Nat. Bank *v.* Sloan, 135 N. Y. 371 (32 N. E. 231); Chatham Nat. Bank *v.* Pratt, 135 N. Y. 423 (32 N. E. 236); Chafoin *v.* Rich, 77 Cal. 476 (19 P. 882); Sterling *v.* Marietta Co., 11 Serg. & R. 179; Coffey *v.* Reinhardt, 114 N. C. 509 (19 S. E. 370); Farmers' Bk. *v.* Reynolds, 13 Ohio, 84; Hibler *v.* Shipp, 78 Ky. 64; Sawyer *v.* Bradford, 6 Ala. 572; Osborne *v.* Thompson, 36 Minn. 528 (33 N. W. 1); Butler *v.* Gambs, 1 Mo. App. 466.

[3] Billington *v.* Wagoner, 33 N. Y. 31; Ducker *v.* Rapp, 67 N. Y. 464; Scott *v.* Harris, 76 N. C. 205; Whittmer *v.* Ellison, 72 Ill. 301; Bradshaw *v.* Combs, 102 Ill. 428; Roberts *v.* Richardson, 39 Iowa, 290; Abel *v.* Alexander, 45 Ind. 523 (15 Am. Rep. 270); Foster *v.* Gaston, 123 Ind. 96 (23 N. E. 1092); Irvine *v.* Adams, 48 Wis. 467 (33 Am. Rep. 817; 4 N. W. 573); Cosetllo *v.* Wilhelm, 13 Kan. 229; Wild *v.* Howe, 74 Mo. 551. But mere part payment of the debt or payment of past due interest, will not raise the presumption of an agreement for extension of time of payment. Nor is it a sufficient consideration to make the agreement binding. First Nat. Bk. *v.* Leavitt, 65 Mo. 563; Petty *v.* Douglass, 76 Mo. 70; Wilson *v.* Powers, 130 Mass. 127; Turnbull *v.* Brock, 31 Ohio St. 649; Stuber *v.* Schack, 83 Ill. 191.

[4] Day *v.* Jones, 150 Mass. 231 (22 N. E. 898); Reed *v.* Stoddard, 100 Mass. 425; Fellows *v.* Prentiss, 3 Denio, 512 (45 Am. Dec. 484); Sizer *v.* Heacock, 23 Wend, 81; McKechnie *v.* Ward, 58 N. Y. 541 (17 Am. Rep. 281); Coates *v.* Thayer, 93 Ind. 156; Rowse *v.* Johnson, 66 Mo. App. 57,

§ 163. **Remedies of surety and guarantor — Contribution between co-sureties.**— If a guarantor or surety is required to pay the bill, note or check, which he guarantees, he has, as against his principal and the creditor, one of two courses to pursue. The more common course, perhaps, is for him to pay the debt and recover of the principal and all other parties whom the holder may have held liable. But his claim against the principal and others, is limited to the amount which he has been required to pay and has actually paid, to secure his own release from liability; with interest on the same, and whatever costs of suit have been incurred in resisting the enforcement of the claim; and the suit must be brought within the statutory period of limitation.[1]

On the other hand, the guarantor or surety may file a bill in equity, making the creditor and principal parties, to enjoin proceedings against himself, until the remedies against the principal have first been exhausted. But the guarantor or surety would in such a case have to indemnify the creditor against loss by the delay in the proceedings against him thereby occasioned. This is an unusual proceeding; because, ordinarily, the interests of the guarantor or surety can be as well promoted by his payment of the debt and recovery of the principal.[2]

If there are two or more guarantors or sureties, they are

Sloan *v.* Latimer, 41 S. C. 217 (19 S. E. 491); Smith *v.* Sheldon, 35 Mich. 42 (24 Am. Rep. 529); Booth *v.* Wiley, 102 Ill. 84; Gardner *v.* Watson, 13 Ill. 347; Jaffray *v.* Crane, 50 Wis. 349 (7 N. W. 300); Morgan *v.* Thompson, 60 Iowa, 280 (14 N. W. 306). The substitution of a demand note for original note has been held to be no such extension of time of payment as will discharge guarantors and sureties. Peninsular Sav. Bank *v.* Hosie (Mich. '97), 70 N. W. 890.

[1] Hall *v.* Smith, 5 How. 96; Swift *v.* Crocker, 21 Pick. 241; Hale *v.* Andrews, 6 Cow. 225; Bonney *v.* Seeley, 2 Wend. 481; Beckley *v.* Munson, 13 Conn. 299; Pace *v.* Robertson, 65 N. C. 550; Junker *v.* Rush, 136 Ill. 179 (26 N. E. 499); Smith *v.* Sheldon, 35 Mich. 42 (24 Am. Rep. 529); Beckwith *v.* Webber, 78 Mich. 390 (44 N. W. 330). See Krugman *v.* Soule, 132 Mass. 285.

[2] King *v.* Baldwin, 17 Johns. 384 (8 Am. Dec. 415); Irick *v.* Black, 17 N. J. Eq. (2 C. E. Gr.) 189; Humphrey *v.* Hitt, 6 Gratt. 509 (53 Am. Dec. 133).

presumed to be co-equal guarantors or sureties; and if one of them is required to pay the debt, he can compel the other to make contribution in equal proportions, unless their liability to each other for contribution has been otherwise determined by express agreement between them. But contribution can be enforced, only when one has actually paid more than his share of the debt.[1]

Successive indorsers are never held to be co-sureties, and liable to each other for contribution, where they do not guarantee the payment of the bill or note to the same original party. But where two parties indorse a bill or note for the same party, they are co-sureties, and, in the absence of an agreement to the contrary, are liable for contribution.[2]

ILLUSTRATIVE CASES.

Moses *v.* Lawrence County Bank, 149 U. S. 298.
North Atchison Bank *v.* Gay, 114 Mo. 203 (21 S. W. 479).
Sloan *v.* Latimer, 41 S. C. 217 (19 S. W. 491).
Salt Springs Nat. Bank *v.* Sloan, 135 N. Y. 371 (32 N. E. 231).
Rogers *v.* School Trustees, 46 Ill. 428.

Guaranties Contemporaneous and Subsequent, Must be Supported by Consideration — When Separate Consideration is Necessary.

Moses *v.* Lawrence County Bank, 149 U. S. 298.

This was an action, brought April 16, 1888, by a national bank, organized under the acts of Congress, and doing business in, and a citizen of Pennsylvania, against six persons, citizens of Alabama and residing in the middle district of Alabama, to recover the amount due on a guaranty of a promissory note.

[1] Fletcher *v.* Jackson, 23 Vt. 581 (56 Am. Dec. 98); Stump *v.* Richardson County Bk., 24 Neb. 522; 39 N. W. 433 (one a concealed surety); Johnson *v.* Harvey, 84 N. Y. 363 (38 Am. Rep. 515); Norton *v.* Coons, 6 N. Y. 33; Southerland *v.* Freemont, 107 N. C. 565 (12 S. E. 237); Monson *v.* Drakely, 40 Conn. 552 (16 Am. Rep. 74); Eiseley *v.* Harr, 42 Neb. 3 (64 N. W. 365); Voss *v.* Lewis, 126 Ind. 155 (25 N. E. 892); Houck *v.* Graham, 123 Ind. 277; 24 N. E. 113 (agreement controlling contribution). See Robertson *v.* Deatherage, 82 Ill. 511; McKee *v.* Campbell, 27 Mich. 497.

[2] Philips *v.* Preston, 5 How. 278; Briggs *v.* Boyd, 37 Vt. 534; Steckel *v.* Steckel, 28 Pa. St. 233. See *ante*, § 86.

The complaint alleged that, on August 15, 1887, the Sheffield Furnace Company, an Alabama corporation, made a promissory note for $12,111.51, payable to its own order four months after date at the banking house of Moses Brothers, in Montgomery; that contemporaneously with the making of the note, and before its delivery or negotiation, and in order to give it credit and currency, its payment at maturity was guaranteed by the defendants, for a valuable consideration, by an indorsement in writing on the note in these words: "We hereby guarantee the payment of the note at maturity," signed by the defendants, and which was intended by them to induce, and which in fact induced, James P. Witherow and all others to whom the note and guaranty were offered for negotiation and sale, to take the note and guaranty and to give value therefor; that the note, with the guaranty thereon, was before its maturity duly indorsed for value by the Sheffield Furnace Company to the order of Witherow; that afterward, and before the maturity of the note and guaranty, Witherow indorsed the note, guaranteed as aforesaid, to the plaintiff for value; that afterward, and before the maturity of the note and guaranty, the defendants indorsed in writing on the note their waiver of note and protest and notice; that the note was not paid at maturity, and that the note and guaranty remained unpaid and the property of the plaintiff.

The defendant pleaded twelve pleas, of which the only ones material to be stated were as follows: —

Fourth. That the guaranty sued on was a special promise to answer for the debt of another, and did not express any consideration for the promise.

Fifth. That the note was given by the Sheffield Furnace Company for a debt owing to Witherow before it was made, and was not founded upon a consideration paid or liability accrued at the time of the making thereof, and the guaranty was without any consideration.

Eighth. That the Sheffield Furnace Company paid the debt sued on to Witherow before this action was commenced.

Twelfth. That the guaranty sued on was a special promise to answer for the debt of another, and did not express any consideration therefor, and was not executed contemporaneously with, nor before the negotiation of, the note of which it guaranteed the payment.

The plaintiff demurred to the fourth and fifth pleas, because they did not deny that the defendants indorsed the guaranty upon the note contemporaneously with its execution and before any negotiation thereof; and also demurred to these pleas, as well as to the twelfth, because they did not deny that the defendant indorsed the guaranty upon the note before its negotiation to the plaintiff and in order to give it credit and currency, nor allege that the plaintff had notice of any want of consideration for the guaranty.

To the eighth plea a replication was filed, alleging that the

plaintiff became the owner of the note for a valuable consideration before maturity, and that no part thereof had ever been paid to the plaintiff or to any one authorized by the plaintiff to receive it. To this replication the defendant demurred.

The court sustained the demurrers to the pleas, and overruled the demurrer to the replication.

Issue was then joined on the eighth plea and the replication thereto; and a trial by jury was had upon that issue, at which the plaintiff gave in evidence the note, purporting to be "for value received," and the following indorsements thereon, in the order in which they appeared upon the note: 1st. "Pay to the order of J. P. Witherow," signed by the Sheffield Furnace Company. 2d. An indorsement in blank by Witherow. 3d. "We hereby guarantee the payment of this note at maturity," signed by the defendants. 4th. Another blank indorsement by Witherow under the guaranty. No other evidence was introduced. Thereupon the court instructed the jury to render a verdict for the plaintiff for the amount sued for, with interest; a verdict was returned accordingly; and the defendant, having duly excepted to the evidence and to the instruction, tendered a bill of exceptions and sued out this writ of error.

Mr. Justice GRAY. By the Statute of Frauds of Alabama, a special promise to answer for the debt, default, or miscarriage of another is void "unless such agreement, or some note or memorandum thereof, expressing the consideration," is in writing, and subscribed by or in behalf of the party to be charged: Alabama Code of 1887, § 1732. The words "value received," or acknowledging the receipt of one dollar, sufficiently expressing a consideration. Neal *v.* Smith, 5 Ala. 568; Bolling *v.* Munchus, 65 Ala. 558.

Every negotiable promissory note, even if not purporting to be "for value received," imports a consideration. Mandeville *v.* Welch, 5 Wheat. 277; Page *v.* Bank of Alexandria, 7 Wheat. 35; Townsend *v.* Derby, 3 Met. 363. And the indorsement of such a note is itself *prima facie* evidence of having been made for value. Riddle *v.* Mandeville, 5 Cranch, 322, 332.

The promissory note, in the case at bar, having been made payable to the maker's own order, first took effect as a contract upon its indorsement and delivery by the maker, the Sheffield Furnace Company, to Witherow, the first taker. Lea *v.* Branch Bank, 8 Porter, 119; Little *v.* Rogers, 1 Met. 108; Hooper *v.* Williams, 2 Exch. 13; Brown *v.* DeWinton, 6 C. B. 336.

A guaranty of the payment of a negotiable promissory note, written by a third person upon the note before its delivery, requires no other consideration to support it, and need express none other (even where the law requires the consideration of the guaranty to be expressed in writing), than the consideration which the note upon its face implies to have passed between the original parties. Leonard *v.* Vredenburgh, 8 Johns. 29; D'Wolf *v.* Rabaud, 1 Pet. 476, 501, 502; Nelson *v.* Boynton, 3 Met. 396,

400, 401; Bickford *v.* Gibbs, 8 Cush. 154; Nabb *v.* Koontz, 17 Md. 283; Parkhurst *v.* Vail, 73 Ill. 343.

The demurrers to the fourth and fifth pleas, therefore, were rightly sustained.

But a guaranty written upon a promissory note, after the note has been delivered and taken effect as a contract requires a distinct consideration to support it; and if such a guaranty does not express any consideration, it is void, where the Statute of Frauds, as in Alabama, requires the consideration to be expressed in writing. Leonard *v.* Vredenburgh, and other cases, above. Rigby *v.* Norwood, 34 Ala. 129.

The demurrer to the twelfth plea, therefore, should have been overruled, and judgment rendered thereon for the defendant, unless the court saw fit to permit the plaintiff to file a replication to that plea.

It was argued on behalf of the original plaintiff that the validity and effect of the guaranty must be governed by the general commercial law, without regard to any statute of Alabama. But there can be no doubt that the Statute of Frauds, even as applied to commercial instruments, is such a law of the State as has been declared by Congress to be a rule of decision in the courts of the United States. Act of September 24, 1789, c. 20, § 34, 1 Stat. 92; Rev. Stat., § 721; Mandeville *v.* Riddle, 1 Cranch, 290, and 5 Cranch, 322; D'Wolf *v.* Rabaud, 1 Pet. 476; Kirkman *v.* Hamilton, 6 Pet. 20; Brashear *v.* West, 7 Pet. 608; Paine *v.* Central Vermont R. R., 118 U. S. 152, 161.

It was also contended that the order sustaining the demurrers, if erroneous, did not prejudice the defendant, because he might have availed himself of the defense of the Statute of Frauds under the general issue. That might have been true, if he had pleaded the general issue. Kannady *v.* Lambart, 37 Ala. 57; Pollock *v.* Brush Electric Association, 128 U. S. 446. But he did not plead it, and had the right to rely on his special pleas only. Alabama Code, § 2675.

The suggestion of counsel, that by the practice in Alabama the entry of an appearance of counsel for the defendant was equivalent to filing a plea of the general issue, is too novel to be accepted without proof, and seems inconsistent with Grigg *v.* Gilmer, 54 Ala. 425. If the record did not show what the pleadings were, it might be presumed that the general issue was pleaded. May *v.* Sharp, 49 Ala. 140; Hatchett *v.* Molton, 76 Ala. 410. But in this case twelve pleas are set forth in the record, and it cannot be assumed that there was any other.

The eighth plea was payment. The defendant introduced no evidence to support this plea, and has, therefore, no ground of exception to the rulings and instruction at the trial of the issue joined thereon.

But the erroneous ruling on the demurrer to the twelfth plea requires the judgment to be reversed, and the case remanded to the circuit court for further proceedings in conformity with this opinion.

Liability of Surety on Note which is Negotiated in Violation of Agreement that Other Sureties were to be Obtained.

North Atchison Bank *v.* Gay, 114 Mo. 203 (21 S. W. 479).

Gantt, P. J. This suit was instituted against Will R. Gay, as principal, and David Gordon and Samuel May, as sureties, on the following written instrument: "$2,500.00. Westboro, Mo., October 10th, 1888. Ninety days after date we promise to pay to the order of North Atchison Bank twenty-five hundred dollars, for value received, with interest from maturity at the rate of ten per cent per annum, together with an attorney's fee of ten per cent of the whole amount due, if collected by attorney or process of law. Will R. Gay. David Gordon. Samuel May. Payable at North Atchison Bank, Westboro, Mo." Defendants Will R. Gay and Samuel May suffered judgment against them by default. Defendant Gordon filed a separate answer, in which he admitted signing the note, but denied its delivery, admitted the incorporation of plaintiff, and then pleaded the following special defenses, to wit, that said plaintiff never paid or surrendered, in any manner, any money or valuable consideration whatever for said instrument; that Gay represented that it was a note for only $2,500; that it would be promptly paid at maturity, and that before it was delivered one A. B. Wilkinson and three solvent sureties would sign it also, and not having his glasses, and relying on Gay, he signed the note; that these representations were all false, and in violation of said agreement the note was delivered by Gay. He also alleges a contract with plaintiff not to accept paper with his name on it unless there were other solvent sureties also. He also charged that Gay turned over collateral securities sufficient, to plaintiff, to pay said note, and asks that it be compelled to credit it. Finally, he charges that plaintiff knew Gay was insolvent, and did not expect said note to be paid by Gay, when it took it, and that Gay turned over to plaintiff all his available property at the time, and this was a fraud on defendant. Plaintiff denied all fraud, and all knowledge of the agreement for other sureties. The cause was tried to a jury under instructions of the court. The plaintiff, to maintain its case, introduced the instrument in writing in evidence, and rested its case. Defendant Gordon then testified, in substance, that on the 17th October, 1888, he drove into Westboro, to a livery stable; that, as he drove up, Gay and Peck, the cashier of the plaintiff bank, were standing on the sidewalk. He heard Gay say to Peck, "'Will Uncle Dave be good on the note?' Peck run both hands in his pocket, and walked off." Gay approached and requested him to sign a note for $2,500. He said he could not do it, but Gay insisted it would be a great accommodation; that five other good sureties would sign. Thereupon he went into plaintiff's bank, and signed the note or instrument sued on. Peck, the cashier, was outside,

he says, and, just after signing the note, Gay and the defendant Gordon came out on the sidewalk, and Gay said to the cashier, "I will take this note, and get the other names on it, and send or bring it up; and it will be all right, will it?" Peck said it would. No other names were mentioned in Peck's presence, but Gay mentioned Brown Wilkinson to defendant as one who would sign with them. The other names he could not call, except May, who did sign. The defendant also called Peck, the cashier, who testified that the bank held a note on Gay for $4,000; that it was past due. About two weeks before the note in suit was given to the bank, the witness, one day, at Rockport requested Gay to arrange the $4,000 note; this being the usual custom of banks,—that when paper became due the maker should either pay it or renew it. He says he saw defendant sign the note in the bank. Did not hear anything about any names to go on the note, and knew nothing of such an agreement. Gay afterwards sent him the note, and on the same day it was credited on the $4,000 note, and about the same time a mortgage was given by Gay to secure the balance of the note. The note sued on, and the mortgage, satisfied the $4,000 note. The court gave the following instruction for defendants: (5) If the jury believes that, at the time defendant Gordon signed the contract or instrument in suit, it was the express understanding and agreement by and between defendants Gay and Gordon that said contract or instrument should not be delivered to the bank until one A. B. Wilkinson had signed the same as security thereon, and you further believe from the evidence, facts, and circumstances in proof that J. W. Peck, the cashier of the bank, had knowledge of such agreement and understanding between Gay and Gordon, and knew that Gordon understood from Gay that said contract or instrument was not to be delivered until it was signed by said Wilkinson, and you further find that said contract or instrument was delivered to the bank without the signature of said Wilkinson, your verdict should be for the defendant. And you are further instructed that the burden of proving that there was an agreement between Gay and Gordon that Wilkinson was to sign the contract or instrument of writing as surety, and that Peck knew of such agreement before he received the same and gave credit on the note, is upon the defendant." The court refused to instruct that such an agreement, made without the knowledge of the bank, would release defendants, and refused to instruct on the alleged promise of the bank not to accept Gordon as surety unless there were other solvent sureties on the notes, and the court refused to instruct on the theory of a conspiracy between Gay and Peck to get Gordon to sign the note. The jury found for plaintiff, and defendant Gordon appeals.

1. Since the decision in State *v.* Potter, 63 Mo. 212, it has been the settled law of this court that when a surety signs a bond or note, and leaves it in the hands of his principal therein, to be delivered only on condition that it is to be signed by other

sureties, and the principal delivers the bond or note, in violation of this agreement, to the obligee, and the obligee has no notice of such an agreement, the surety will be bound. State *v.* Modrel, 69 Mo. 152; State *v.* Baker, 64 Mo. 167; State *v.* Hewitt, 72 Mo. 604; Woolf *v.* Schaeffer, 74 Mo. 158. Hence the trial court very properly refused defendant's first instruction, which ignored notice to the bank of the alleged agreement as to additional sureties. Instruction No. 5, copied above, gave defendant the benefit of the law as it is established in this State. It is his misfortune if he could not convince the jury the bank knew of his agreement with Gay, and of its violation. There was nothing on the face of the paper itself to indicate that it was incomplete.

2. Nor can we agree with learned counsel that the record shows no consideration for this note. The taking of this new note, extending the time of payment 90 days, and crediting the old note with that sum as payment, was ample consideration for the promise in the new. Bank *v.* Frame (Mo. Sup.), 20 S. W. Rep. 620; Crawford *v.* Spencer, 92 Mo. 498; 4 S. W. Rep. 713; Deere *v.* Marsden, 88 Mo. 512.

3. The court very properly declined to hear the evidence of defendant to the effect that he had an agreement with the cashier not to take notes with his name on them unless they were otherwise solvent. The alleged promise was without any consideration, and was no defense to this action.

4. Neither was there any error in giving plaintiff's first and only instruction. The contract provided that "if it should be collected by any attorney, or by process of law," the attorney's fee of 10 per cent should be added. The action itself proved that both conditions had happened. An attorney was collecting the note by process of law. The court needed no further evidence to justify it in instructing for the additional sum.

5. The other instructions were properly refused because unsupported by the evidence. The irregularity in the judgment was not raised by the motion for new trial or in arrest, and cannot be noticed here.

The court having given correct instructions, and the jury having found the facts against the defendant, upon competent evidence, we have no right to interfere with the verdict, and the judgment is affirmed. All concur.

Extension of Time of Payment Without Consent of Surety, Discharges Him Although He has not been Thereby Prejudiced.

Sloan *v.* Latimer, 41 S. C. 217 (19 S. W. 491).

McGowan, J. On July 1, 1890, J. A. Mooney and J. P. Latimer executed their sealed note, joint and several, for $600, due one year after date, payable to Thomas Sloan, or bearer,

interest from date at 8 per cent per annum, payable annually. On May 13, 1891, Sloan made the following memorandum on the note, at the bottom: "I hereby extend date of payment of above note to January 1, 1892, with the privilege of payment before maturity." The note not having been paid at maturity, action was brought on said note against J. P. Latimer, who answered, and, after making a general denial of all liability, alleged, by way of special defense, that he did sign with J. A. Mooney such a note as is decribed in the complaint, but that he was a surety thereto, and that the memorandum above set forth constituted such an alteration of the contract, and such an extension of the time of payment, as discharged his obligation as surety. The cause was tried by Judge Norton and a jury. The signature of the defendant, Latimer, to the note, was proved, and it was offered in evidence. Defendant objected, on the ground that it was not the note declared upon, having been altered. Objection overruled. The plaintiff then testified that he had voluntarily made the memorandum on the note, without consultation with any of the parties, as a kindness to Mooney. At the close of the plaintiff's testimony, the defendant moved for a nonsuit, upon two grounds: First, that the memorandum was such an alteration as avoided the note; second, that it was such an extension of credit as discharged the surety. Motion refused, and, under the charge of the judge, the plaintiff had a verdict for $702.86. From this vedict and judgment thereon, the defendant appeals, upon the following grounds: "(1) Because the circuit judge erred in admitting in evidence a certain sealed note signed by J. A. Mooney and J. P. Latimer, for six hundred dollars, of date July 1, 1890, when it appeared from its face that it was not the same described in the complaint, in that it contained other stipulations than those mentioned. (2) In refusing defendant's motion for a nonsuit, because (a) the note and plaintiff's own testimony showed that plaintiff, since its execution and delivery, had materially altered the terms thereof, by adding thereto other stipulations and agreements, without the knowledge or consent of the surety, the defendant in this action; (b) because it appeared from the face of the note and plaintiff's own testimony that plaintiff had, since the execution and delivery of said note, extended the time of payment thereof for J. A. Mooney, the principal debtor, without the knowledge or consent of this defendant, the surety to said note; (c) because there was no evidence entitling plaintiff to a verdict. (3) In not holding that said note was void, in so far as the defendant was concerned, in that plaintiff had added, since its execution and delivery, other material stipulations and conditions than those originally contained in the said note, without defendant's knowledge or consent. (4) In sending the jury back into their 1oom after they had rendered a verdict for the plaintiff. It in no way appears that the verdict rendered was due to their mistake or inadvertence, or other than they intended to render," etc.

It seems that, after some conflict in the authorities upon the subject, it has been finally settled in this State, "that any alteration of a written security, in a material point, renders it void at least as to a surety." Vaughan *v.* Fowler, 14 S. C. 357; Plyler *v.* Elliott, 19 S. C. 257; Gardner *v.* Gardner, 23 S. C. 588; Sanders *v.* Bagwell, 32 S. C. 238; 10 S. E. 946; and authorities referred to. Then, was there in this case such an alteration as to come within the rule above stated? It is certainly not obvious that there was any alteration, which was likely to injure the surety, and was intended for that purpose. It seems, however, that the test is not whether the alteration complained of was injurious or beneficial to the surety, but whether there was a material alteration of any kind whatever, as the surety is entitled to stand upon his contract percisely as he made it. A surety is a favorite of the law, and has a right to stand on the strict terms of his obligation. Tinsley *v.* Kirby, 17 S. C. 1. It is true no words in the note were actually stricken out, and others substituted for them. The note by its terms was due "one year after date, July, 1890," and the memorandum written on the face of the note was in these words: "I hereby extend date of payment of above note to January 1, 1892, with privilege of payment before maturity," etc. Was that not, in effect, equivalent to striking out the words "one year after date," and inserting in their place "one year and six months after date?" We suppose that, during the six months supplemented indulgence, the payee of the note could not have sued upon it; and in that respect the case is analogous to that of Gardner *v.* Gardner, supra, in which, after contest, it was held that, "where a creditor receives from the principal debtor payment of interest in advance on a past-due note, an agreement to give time is necessarily implied, and the creditor thereby debars himself of suing meantime on the note, and the surety is therefore discharged, unless the creditor can show mistake, or possibly an agreement that the right of suit should not be suspended." So we think the payee in this case could not have sued upon the note before the extended time allowed for payment had expired, and for that reason, as in Gardner *v.* Gardner, the surety in this case was discharged. The judgment of this court is that the judgment of the circuit court be reversed. McIver, C. J., and Pope, J., concur.

Release of Guarantor by Want of Due Diligence in Enforcing Draft Against Acceptor.

Salt Springs Nat. Bank *v.* Sloan, 135 N. Y. 371 (32 N. E. 231).

Appeal from supreme court, general term, fourth department. Action by the Salt Springs National Bank of Syracuse against George B. Sloan on a bond guarantying several drafts accepted by Baker & Clark and discounted by plaintiff. The trial at circuit resulted in a verdict in plaintiff's favor. From an order of

the general term (15 N. Y. Supp. 306) setting aside a verdict and granting a new trial, plaintiff appeals. Reversed.

PECKHAM, J. This action was tried at the Onondaga circuit before a jury. The bond upon which the suit was brought was executed by the defendant February 19, 1887. For some time prior to that date there had been a firm doing business at Oswego under the name of Austin & Co., and such firm had at that time been insolvent for some months. There was another firm doing business in the city of New York under the firm name of Baker & Clark, which firm, some months prior to the above date, had also become insolvent, and had made an assignment to an assignee for the benefit of creditors. The firm of Austin & Co. had drawn drafts to the amount of over $10,000 upon the firm of Baker & Clark, which firm had duly accepted them, and the drafts had been discounted for the New York firm by the plaintiff. They had all matured and been dishonored prior to the execution of the bond in suit, and the plaintiff still held and owned them. On the 19th of February, 1887, the defendant executed the bond, and at the same time, and as part of the same transaction, the plaintiff, by its president, executed an agreement in writing, and delivered it to the defendant. The bond recited the drawing of the drafts, six in number, giving the names of their makers and acceptors, dates and amounts, and also stated that Baker & Clark had made an assignment for the benefit of their creditors before any of the drafts became due, and had preferred plaintiff in class "B" of creditors for the amount then owing on the drafts, and being about $7,000; and that not one of the drafts had been paid. The bond then continued with this language: "Now, therefore, the condition of this obligation is such that if the above-bounden George B. Sloan shall, within one year from date thereof, pay the said Salt Springs National Bank of Syracuse any deficiency up to the said sum of $5,000 remaining unpaid to said bank on said drafts and which the said the Salt Springs National Bank of Syracuse, after due diligence, shall fail to collect within the time above limited from the said Baker & Clark, or either of them, or from the said Clarence F. Birdseye, as assignee, as aforesaid or otherwise, then this obligation to become void; otherwise to remain in full force and virtue." The agreement made on the part of the plaintiff recited that "whereas, the Salt Springs National Bank of Syracuse has this day received from George B. Sloan, of the city of Oswego, N. Y., his bond for the sum of $5,000, dated February 19, 1887, upon the following terms and conditions, and the terms and conditions in said bond set out, to wit: Said bank shall use due diligence to collect the six drafts named in said bond from Clarence F. Birdseye, of New York city, as assignee of the Baker & Clark named in said bond, or from Baker & Clark, and out of the moneys obtained from said assignee "the bank was to apply the same to the payment of the drafts, and, if any surplus moneys had been paid by Sloan, they were to be returned him by the bank. It also appeared in evidence that

before the first of the drafts mentioned in the bond had become due the drawers had "got into financial difficulties, and transferred their property." The first draft which became due was placed in the hands of the attorney for the plaintiff, and judgment against the drawers was recovered and supplementary proceedings had been instituted against them, and some negotiations had been entered upon for the giving of security by the drawers. It was at this stage of the matter that the bond and agreement above referred to were executed. The understanding between the parties seems to have been that the plaintiff was to take no further proceedings against Austin & Co., but should go on, and see what could be collected from the New York people. The amount of the drafts not having been collected from Baker & Clark, or their assignee, within the year, the plaintiff commenced this action against defendant, and sought to recover the $5,000, which it alleged he was liable for by reason of the execution of the bond. The defendant set up in his answer as a defense that the plaintiff had not performed the condition precedent to a liability on his part on the bond, and he alleged that it had failed to proceed with due diligence to collect the amount due on the drafts from Baker & Clark, or either of them, or from their assignee. Upon the trial the sole substantial issue was whether the plaintiff had or had not used due diligence in its prosecution of the acceptors or their assignee. Evidence was given as to what it had done, and the time and manner of doing it, and some evidence was given on the part of the defendant. The learned trial judge submitted the question as to the due diligence of the plaintiff to the jury, and a verdict for the plaintiff was rendered by it. The general term has held that the evidence in the case was undisputed, and that it raised a question of law only, and upon that question it held that the plaintiff had not prosecuted its attempt to collect with due diligence, and therefore was not entitled to recover, and it reversed the judgment, and granted a new trial, and from the order granting a new trial the plaintiff has appealed here.

The general rule in regard to one who becomes the guarantor of the collection of a demand is that in so doing he undertakes that the claim is collectible by due course of law, and the guarantor only promises to pay when it is ascertained that it cannot be collected by suit prosecuted to judgment and execution against the principal, and the endeavor to so collect is a condition precedent to a right of action against the guarantor; and the fact of insolvency is no excuse for the failure to prosecute. Craig *v.* Parkis, 40 N. Y. 181; Insurance Co. *v.* Wright, 76 N. Y. 445. The judgment must have been recovered, and the execution issued thereon must have been returned unsatisfied in whole or in part, before any liability is fastened upon the guarantor; and this judgment must have been recovered without unnecessary delay. The guaranty in question is peculiar in its language. At the end of the year the guarantor promised to pay any deficiency

up to the amount of $5,000 remaining unpaid on the drafts after due diligence had been exercised by the bank to collect their amount within the time limited. It is plain that due diligence might be exercised in such case during that time, and yet no judgment have been recovered, and, of course, no execution issued or returned unsatisfied. If it had been thus exercised, the liability of the guarantor would attach without the recovery of such judgment. In this respect there is a distinction between the guaranty contained in this bond and that of a general guaranty of collection. There is the further difference that the guarantor promises to pay the deficiency up to the stated amount which the plaintiff fails to collect within the year (after due diligence) from Baker & Clark, or either of them, or from their assignee. It was understood that Baker & Clark had made an assignment for the benefit of their creditors, and, if the assignment was not fraudulent, it was, of course, known that the property of Baker & Clark had become the property of the assignee, as trustee, and for the purpose only of executing the provisions of that instrument. In that case the only recourse the plaintiff could have against the assignee would be to see to it that he faithfully and expeditiously carried out the directions contained in the assignment. This the assignee might, and presumptively would, do without any resort to compulsory process on the part of the plaintiff or any other party. The due diligence that was required of the plaintiff did not, therefore, render it necessary that legal proceedings should at once be commenced against the assignee. If the latter was proceeding with proper celerity in the execution of his trust, and assuming the validity of the assigement, there was nothing for the plaintiff to do of a legal nature as against him. If, however, the assignment was invalid, and had been made for the purpose of hindering and delaying creditors, then an attack against the assignee as well as against the assignors for the purpose of setting aside the assignment might be necessary. In order to determine the question of the validity or the invalidity of the assignment, knowledge of the facts which caused its execution, and some evidence of the motives accompanying it, would obviously be necessary. If plaintiff entered upon and prosecuted the examination of this question with due diligence and discovered there were no grounds upon which to base an attack upon the good faith and validity of the assignment, and if the assignee duly performed his duties under the assignment while the year lasted, it would seem that under such facts it could not be determined as matter of law that the plaintiff had not done all which could be expected of it, or that due diligence required as against the assignee to fulfill the conditions of the bond in question. The duty to use due diligence in attempting to collect from Baker & Clark was also incumbent upon the plaintiff. It was not an alternative duty, which existed only in case the assignee were not proceeded

against. The condition of the bond called, as I think, for the exercise of due diligence as against both; but the fact (if it were a fact) that examinations and investigations regarding the validity of the assignment itself were in progress might properly be taken into consideration upon the question whether due diligence were being used in reference to Baker & Clark. Again, it might, under some circumstances, be quite an important question to determine as to the character of the legal proceedings to be taken against the principals. Should such proceedings be the simple action upon the drafts as upon instruments for the payment of money only, or should the action be one in tort, as arising out of a fraudulent creation of the debt, and thus give to the plaintiff the right to arrest on mesne process, and to take the person upon the judgment to be obtained? The answer would depend upon the facts to be learned, and, if there were suspicious circumstances, which might fairly justify the resort to a more prolonged investigation, made in good faith, and for the honest purpose of obtaining information upon which to act, it could not be said as a matter of law that in such case, and pending the investigation, due diligence was not exercised in attempting to collect the amount of the drafts by action.

With this review of the situation and of the meaning of the bond in suit, it is proper in a very general way to advert to the evidence given on the trial on the part of plaintiff as to what the plaintiff actually did in the way of using due diligence to collect the amount of these drafts. Almost immediately after the execution of the bond the supplementary proceedings against Austin & Co., which had been commenced in Oswego, were resumed, for the purpose of obtaining from them, and in a manner which would not appear to be voluntary, certain letters in their possession, which it was thought might be of importance upon the proceedings which might be commenced against Baker & Clark in New York; and under the cover of these proceedings the attorney of the plaintiff obtained the letters. It is to be gathered there was some importance attached to them relative to the question of the liability of Baker & Clark as for a fraudulent debt in obtaining the discount of the drafts by the plaintiff. Then the attorney for the plaintiff went to New York, and entered upon what he claimed was a most thorough investigation of all the facts attending the execution of the assignment, for the purpose of discovering, if possible, some means of attacking its *bona fides*. He went to different creditors, put himself in communication with their attorneys to ascertain if they knew of any facts which would aid in such an attack, and, in brief, he did, as he claims, everything that one could be expected to do who, acting in good faith, was endeavoring to find out if any facts existed which would justify an attack upon the assignment, or an action of tort against the acceptors of the drafts. Finally he became convinced there was no chance of success in such an endeavor. He also endeavored to find if there was any property of the firm

which had not been turned over to the assignee but did not succeed in finding any. All these investigations took some time, before it was finally determined that the assignment could not be successfully attacked. In the meantime, and within a week from the signing of the bond, the attorney for plaintiff commenced to investigate the whereabouts of Baker,— one of the firm of Baker & Clark; and the evidence is quite minute as to what he did towards finding Baker, for the purpose of serving process upon him. Mr. Baker was in Brooklyn but a very short time after the execution of the bond, and it was claimed he was endeavoring to avoid the service of process. He soon left the State, and did not return until the middle of August. The plaintiff did not succeed in serving him before he left the State, and the defendant charges that no fair effort was made, and that from plaintiff's own showing service could have been made on Baker frequently while he was within the State. No service of process was made on Clark, the other member of the firm, until after Baker's return, and some time in September, although he could have been served at any time during the period. The plaintiff says the reason for the omission was that Clark could be served at any time, and, if served during Baker's absence, it was feared the latter might not return, and it was not thought wise to sue Clark separately. Negotiations were also pending by which it was sought to obtain some security from a brother of Baker, and finally the brother, who was a preferred creditor of Baker & Clark of the first class, assigned the balance due him under the assignment as security for the payment of the drafts, or some portion thereof. It was feared these negotiations would be broken off if suit was commenced against Clark while Baker was away, and that in such case Baker would remain away. The defendant charges these negotiations with Baker were only for the payment of the amount over the $5,000 claimed from defendant, and that there was no good faith in the matter of these negotiations, or in the excuse for the alleged failure to press with due diligence the case against Baker & Clark. Process was finally served on Baker, August 27, 1887, he having returned to the State on the 15th of that month, and on Clark on the 7th of September following. They appeared by attorney, and, under a threat on the part of the latter to put in an answer unless time for an investigation into the matter was given, the attorney for plaintiff gave various extensions of time to answer, aggregating some 90-odd days, when a default occurred, and judgment was entered January 4, 1888, and a transcript filed in New York county, January 5, 1888. After the date of the service of the process on Baker and Clark the first circuit held in Onondaga was appointed for the fourth Monday — the 26th — of September, 1887. An answer would have prevented the case going on at that circuit. The next circuit was held in that county January 9, 1888. Before that date judgment had been obtained. It was claimed by the plaintiff that by the course pursued, which, it is urged, was guided to

some extent, by the threat of Baker & Clark's attorney to put in an answer, and defend, at any rate, if time was not given, the extensions of time actually given, operated to plaintiff's advantage by finally enabling it to obtain judgment at an earlier day than it would have been enabled to do if the extensions had been refused, and the defendants in that action driven to the serving of an answer. The defendant here claims the extensions were wholly voluntary, totally unnecessary, not given under a bona fide effort to prosecute with due diligence, and hence they constituted an inexcusable delay in prosecuting the action, and a defense to this action on the bond. After the entry of the judgment and the filing of a transcript thereof in New York county, there was a delay of over a month in the issuing of an execution thereon. The attorney for the plaintiff swore he intended that an execution to the sheriff of New York should accompany the transcript, and he supposed that it did, but in fact it did not, and in fact it was not issued for more than a month. The attorney says he can only explain the omission by a mistake, or his absence from home during the time. No claim is made that the defendants Baker & Clark had any property which might have been reached by an execution if one had been issued at once upon the entry of the judgment, and there is no fact found in the evidence which would lend any color to the suspicion that the assignment was not a bona fide one, which transferred all the property of Baker & Clark to the assignee in trust. It also appears that the plaintiff was in the second class of preferred creditors in that assignment, and that there was not enough property to pay in full the creditors in the first class; and it is not charged that the assignee was guilty of any want of diligence in any matter pertaining to his trust.

This, in substance, is the case as it appeared for the plaintiff upon the trial, and it is this case which the learned general term holds presents a question of law only. It is undoubtedly true that in many, perhaps in most, cases the question of what constitutes due diligence, where it arises upon undisputed evidence, is one of law only. What shall constitute a reasonable time in which to do an act is also generally held to be a question of law. So is the question of what constitutes probable cause in an action for a malicious prosecution. So, also, is the question of negligence in certain contingencies. In none of these instances is there, however, an unyielding rule that upon undisputed evidence the question is universally one of law. It depends frequently upon the character of the evidence itself whether it is of such a nature that but one inference could be drawn from it by reasonable and intelligent men. In such a case as this, for instance, the due diligence of the plaintiff is not a fact that could be testified to directly and in terms. A witness for the plaintiff would not be permitted to swear that due diligence was observed in the prosecution of Baker and Clark. In order to prove due diligence, all the material existing facts surrounding the

case should be shown, and a statement in detail of all the things actually done in the way of prosecuting the matter would have to be proven, and then, from all these things thus proved, the resultant fact of due diligence, or its absence, would have to be found either by the court or a jury. If this resultant fact to be found from all the evidence in the case, uncontradicted though that evidence may be, were of so doubtful a nature that different and equally intelligent and unbiased men might fairly differ in opinion as to its character, then the jury, under proper instructions from the court, should examine the evidence, and find the fact which is properly to be inferred therefrom. It was at one time thought that, where the evidence was uncontradicted or undisputed, the question of negligence was one of law only; but that claim has long since been abandoned. There may be cases, of course, where, the evidence being undisputed, a clear question of law only arises, and the court thereupon decides that no negligence is shown, or the reverse. If the uncontradicted evidence shows a case where different inferences might be drawn from undisputed facts as to the existence or non-existence of negligence, it has been the law for many years that such inferences are to be drawn by the jury, under proper instructions from the court. Hart *v.* Bridge Co., 80 N. Y. 622. The same may be said of the want of probable cause in actions for malicious prosecution. Generally it is a question of law, yet frequently, upon undisputed evidence, it is made a mixed question of law and fact. The jury draws the inferences, if they might fairly be the subject of difference in different minds of equal intelligence, and the court gives the proper instructions to the jury. This principle was thus asserted in the case of Mead *v.* Parker, 111 N. Y. 259, 18 N. E. Rep. 727, although, perhaps, it was not directly and necessarily involved in the point actually there decided. See, also, Sullivan *v.* Cement Co., 119 N. Y. 348; 23 N. E. Rep. 820; Reilly *v.* Dodge, 131 N. Y. 153, 159; 29 N. E. Rep. 1011. The principle is, however, correct. If the undisputed evidence shows a state of facts from which but one inference could properly and justly be drawn by any fair and intelligent man, then the question of due diligence is one for the court alone.

Upon the evidence already detailed in this case we are clearly of the opinion that the question presented was one for the jury, under proper instructions from the court. The court charged that the plaintiff was bound to use due diligence up to the time it commenced this action, although beyond the period of the year specified in the bond. The jury was charged with the duty of considering the question whether, upon all the evidence in the case, the plaintiff used due diligence in prosecuting Baker and Clark, and also against the assigned estate. The court also said to the jury that, if the extensions of time to answer were given voluntarily (of which they were to judge upon the evidence), then more time was given to the defendant than due process of law entitled

him to. The defendant here makes several claims as proved by this evidence. He urges, first, that the failure to serve Baker with process before he left the State in March or April, 1887, was a failure to exercise due diligence, and that the efforts to serve him as stated on the part of the plaintiff were not made in good faith, and were not, under all the circumstances, sufficiently persistent to show due diligence. This question of good faith was peculiarly proper, upon the evidence, for a jury to decide. It is also claimed the excuse for the failure to serve Clark until after Baker had been served was unjustifiable. The evidence upon that subject, though not disputed, leaves a question as to the *bona fides* of the excuse actually given, whether the fact stated was really and in good faith the motive and cause of plaintiff's conduct. This, also, upon the evidence, was a question for the jury. The negotiations for security from Baker's brother are also attacked as not having been made in good faith, and for the purpose of collecting as much as possible upon these drafts; and consequently it is urged that they furnish no excuse or justification for failing to serve Clark, even though Baker was out of the State. The excuse offered for this failure has been stated above, and here, again, we think it was a fair question for the jury to say whether the excuse was a *bona fide* one, and had really caused the delay spoken of. Other questions of good faith on the part of the plaintiff arose in the progress of the case. Enough has been said to show the question whether the plaintiff acted with due diligence depended upon the construction to be given quite a number of different acts of the plaintiff, and upon the motives which accompanied them; whether those acts were in reality performed in good faith, and for the purpose of honestly fulfilling the duty owed by plaintiff to defendant, or were simply actions intended as a mere cover or blind to excuse the failure to prosecute, while at the same time affording ground for the pretense that the plaintiff had done all it could to collect the drafts from the assignee of the estate or from the firm of Baker & Clark. These matters were peculiarly of a nature for a jury to decide upon, and it would appear that the question was submitted to that tribunal with great fairness by the learned trial judge, and upon proper instructions as to the law governing the case.

One other objection to this recovery is made by the defendant. The plaintiff failed to prosecute Baker and Clark by action upon one of the six drafts mentioned in the bond. It commenced its action and obtained its judgment upon the remaining five only. The defendant claims the prosecution should have been upon all of them, and that the failure constitutes a defense to the bond. The draft upon which no suit was brought was put in evidence, and the plaintiff maintained it was paid, although it was not so marked. The court charged it might be considered a due prosecution of the draft when the plaintiff acknowledged that it got the money on it, and made no demand upon the defendant therefor. The plaintiff, in truth, made no claim for or on account of

that draft, and we think the trial court committed no error in the disposition of the case with regard to it.

We have looked through the case with respect to the exceptions taken upon the decisions of the court as to the admission or rejection of evidence, and we are unable to see that any error to the prejudice of the defendant occurred in their disposition.

Upon the whole case, we think the court properly left the question of due diligence to the jury. The order of the general term granting a new trial should therefore be reversed, and the judgment entered upon the verdict of the jury should be affirmed with costs. All concur, except Andrews, J., not voting.

Surrender of Securities Held by Payee or Indorser Discharges Guarantor or Surety.

Rogers *v.* School Trustees, 46 Ill. 428.

Mr. Justice Walker. This was an action of debt, brought by the schools of township 23, north of range 4, east, in the McLean circuit court, against John J. Price, George W. Stipp and Elihu Rogers, on a note under seal. Price was defaulted, but Rogers and Stipp filed separate pleas; and there was an agreement by counsel in the case, that all matters that might be specially pleaded could be given in evidence under the general issue. A trial was had by the court, resulting in a judgment in favor of the plaintiffs for $958 debt, and $478 damages, from which an appeal was prayed by Rogers and Stipp, but the former alone perfected his appeal, and brings the case to this court.

It appears from the record that the school commissioner sold to Price the N. E. 16, 23 N. 4 E., on the 1st of October, 1851, for the sum of $478.09, and took his note for that amount for the purchase-money, payable five years after date, with Rogers, Stipp, and Glimpsie as securities. He, at the same time, took of Price a mortgage on the premises to secure the payment of the note. On the same day Stipp also purchased the S. E. quarter of the same section, from the school commissioner, for $479.19, for which he gave his note, with Price, Rogers, and Glimpsie as securities, and gave a mortgage on the land to secure its payment. Afterward the school commissioner turned over the notes to the appellees, and they held them as a part of the school fund of the township.

Before the maturity of the notes, Price bought Stipp's quarter for about $4,000, and as a part of the consideration, agreed to pay Stipp's note, given to the school commissioner, and gave his notes for the remainder. To secure these notes he executed a mortgage on the premises. About this time the notes to the school commissioner fell due, and the treasurer of the township applied to Price and Stipp to renew the notes, and Price gave his note for both of the previous notes, and Rogers and Stipp became sureties, and the old notes were given up and cancelled.

The treasurer still held the mortgages given to the school commissioner by Price and Stipp. On the 2d day of January, 1857, Price executed a mortgage to one Folsom, on the N. E. qr. 16, 23 N. 4 E., to secure a note of $1,180, given by him to Folsom, due in one year, which was duly recorded the day after it was executed.

On the 8th of October, 1858, appellees applied to Price to give them a new mortgage, to secure the note which he executed on the same quarter section he had mortgaged to Folsom. Appellees accepted this mortgage and canceled both of the first mortgages, and had this mortgage recorded. On the 5th of December, 1861, Nichols, the assignee of the $5,600 mortgage given by Price to Stipp, filed his bill to foreclose. A decree was rendered for $5,000, declaring that the mortgage was the first incumbrance on the land. Under this decree the land was sold to Nichols for $3,200, and not being redeemed he received a deed. On the 23d day of August, 1861, Folsom filed a bill to foreclose his mortgage on the Price quarter. Appellees were made parties, and were defaulted, and a decree of foreclosure was rendered for the amount of the mortgage, which was declared to be a first lien on the land. This land was sold to complainant under the decree for $1,229.92, and not having been redeemed within twelve months, Nichols, as a judgment creditor, redeemed and became the purchaser, and afterward received a deed.

It appears that at the time the mortgages were foreclosed the lands were worth twenty dollars an acre, and Nichols testified that he has since sold them, each quarter for $4,000, to innocent purchasers, without notice of the equities of the parties, and that Price has been for years wholly insolvent.

About the evidence, there seems to be but little difference as to what it proves, but the question in controversy is, whether the release of the prior mortgages, after the execution of the new note was such an act as would release the securities to the new note, and if so, whether, as the note is joint and several, without in any manner disclosing the fact that any of the makers are securities, that fact may be shown by extrinsic evidence. In all proceedings between themselves the makers may show their relations to the transaction by evidence outside of the note or obligation. And, while there is some diversity in the decisions of the various courts as to whether, in a suit at law by the payee against the makers, they may aver and prove that a portion of them are merely securities, and that they have been released as such by the acts of the payee. But the rule is settled in this court that the defense may be made at law, as well as in equity. Flynn *v.* Mudd & Hughes, 27 Ill. 328; Drew *v.* Drury, 31 Ill. 250; Kennedy *v.* Evans, Id. 258.

It is, however, urged that there is a distinction between a note under seal and an unsealed instrument. That the law has made a distinction in a class of cases, for some purposes, is unquestionably true. It has declared that some instruments, if not under

seal, shall be inoperative to accomplish the purpose for which they are executed. It is so of a deed for the conveyance of real estate, a bill of exceptions, and some other instruments; but the reason of such a requirement has long since ceased, and it is now only necessary because of the imperative demands of the law. Our statute making notes assignable, whether under seal or not, has, to that extent and for that purpose, abolished all distinction between the two classes of paper. The one is negotiable as well as the other, and the same incidents attach to one class as the other. This statute abolishes many of the common-law distinctions which affected choses in action. At common law these instruments were not assignable so as to pass the legal title to the instrument; but this statute authorizes it to be done precisely as by the indorsement of a bill of exchange. It also permits the common-law presumption of a consideration for the instrument which a seal creates, to be rebutted and overcome by averment and proof; and we are at a loss to perceive why the presumption that all the makers are principals, may not be overcome in the same manner. The statute has permitted an averment against the legal implication created by the use of a seal, and no valid reason has been urged, and none occurs to us, why the other inference, that all of the makers, in the absence of a statement in the instrument that they are not, may not be overcome in the same manner and to an equal extent, where the note is under seal, as where it is unsealed. The same reasons seem to apply with equal force.

We now come to the consideration of the other and more important question, which involves the merits of the controversy. The doctrine is well and almost uniformly established, that, in equity, the mere change of the form of the debt does not, as between the parties to the transaction, change the security; that the mortgage is the incident and follows the debt in its various changes, whether by renewal, judgment or otherwise. When the new note, therefore, was executed in this case, unless there had been an agreement to that effect, it did not change the lien of the debt upon the land created by the mortgages, especially when no further security was taken. The parties to this note were the same persons who had executed the original notes, except Glimpsie. So far, then, from taking further security, a portion of that already held was discharged. Even then, if taking further security could have operated to discharge the mortgages, that cannot be insisted upon in this case. The new note was given to the creditor in the first notes, and there was, in that respect, no substantial change in the transaction.

These mortgages were a continuing security for the purchase-money, were on record, and notice to the world, until they were subsequently satisfied by the creditor, without the assent of the sureties. Any person dealing with the land and seeing these mortgages would have been led to make inquiries whether they had been discharged by payment or extinguishment of the debts,

and upon such inquiry of the persons to whom they pointed for information, they would have learned the true situation of the transaction. It appears that the lands embraced in the mortgages were amply sufficient in value to have more than discharged the indebtedness. They were also the first and superior liens on the land, the subsequent creditors having procured their mortgages subject to this incumbrance. It also appears that Price, the principal in the new note, had become insolvent, and the debt, if paid, would have to be by the other parties to the note. That appellant is, therefore, injured, there can seem to be no doubt.

Had there been no release of these mortgages, the sureties, upon paying voluntarily, or being compelled to pay the debt, would have been subrogated to the rights of the creditor and could have enforced the lien in equity and had the money thus paid refunded to them. But by their satisfaction and the release of the lien, other innocent parties have acquired rights that operate to cut off their remedy against the land, and to this the sureties never gave their assent, nor do we see that they have ever ratified the action of the township treasurer. In this they have been deprived of important rights.

But may this defense be interposed in an action at law? We have repeatedly held that the release of a principal by a valid agreement for the extension of time for payment, without the consent of the surety, operates as a discharge, and he may avail of the defense in an action at law. This defense depends upon different principles, as in this class of cases the original contract is not changed in terms between any of the parties, but a collateral indemnity, held in trust by the creditor, and upon which the surety has a right to rely, has been destroyed, and he is presumed to have suffered loss by the surrender of the security. The creditor, having misapplied the trust fund and acted in bad faith toward the surety, must be held to have released the surety in equity, or, rather, to be estopped from looking to him for payment, by reason of his bad faith in discharging his duty to the trust fund held for their common security.

It is certainly true that where a pledge of real or personal property has been given by the principal debtor, to secure the debt, such securities enter into and form part of the elements of the transaction, and must be presumed to have operated as an inducement to the surety to incur his liability. Such securities are regarded by him as a means of safety, and according to the usual course of business he is entitled to rely upon them as an indemnity against ultimate loss. And for the same reason that a creditor may not prevent the surety from resorting to recourse upon his principal, he cannot prevent him from protecting himself against ultimate loss by looking to the securities which have been pledged for the payment of the debt. The surety has as ample a right to avail himself of the indemnity such securities afford, as he has to resort to his principal. And any destruction of such collateral securities by the creditor must be held as releasing a

surety, at least to the extent of their value. Copel *v.* Butler, 2 Simons, 457; Hayes *v.* Ward, 4 John. Ch. R. 123. This seems to be the uniform rule in equity.

Under the more stringent and technical rules of the ancient common law it was held that relief could only be had in equity to discharge a surety. But under the tendency of modern decisions substance is more regarded than mere form, and the doctrine seems now to be recognized, that whatever discharges a security in equity may be interposed in a suit at law, unless there be such a complication of interests as would prevent a court from affording adequate relief. And although relief may be had in both courts the chancellor will not send a case to a court of law to seek his defense. Samuel *v.* Howarth, 2 Mer. 287; Mayhew *v.* Circkett, 2 Swanst. 185; Hawkshaw *v.* Parkins, Ib. 539; Eyre *v.* Everett, 2 Russ. 382; Mackintosh *v.* Wyatt, 3 Hare, 567; Moore *v.* Bowmaker, 6 Taunt. 379; Melville *v.* Glendenning, 7 Taunt. 126; Philpot *v.* Briant, 4 Bing. 717. And we can see no reason why a court of law is not as competent to try the defense as that of equity, and no practical benefit is perceived in compelling the security to resort to the more tedious and expensive mode of trial to obtain a discharge. We are therefore inclined to follow these authorities and permit this defense to be made. We are therefore of the opinion that appellant has established a complete defense on his part to the note, and that the court below erred in rendering judgment against him. The judgment of the court below is reversed and the cause remanded. Judgment reversed.

CHAPTER XVI.

CHECKS.

SECTION 164. Check distinguished from a bill of exchange.
165. Checks are drawn on a bank or banker.
166. Check payable on demand and without grace.
167. The form and formalities of the check.
168. Certification of checks.
169. Negotiation and transfer of checks.
170. Memorandum checks.
171. Presentment, notice and protest of checks.
172. Within what time must check be presented.
173. Presentment of check by mail and by deposit.
174. What will excuse failure or delay in demand and notice.
175. When is a check stale or overdue.
176. Effect of death of drawer.
177. Right of checkholder to sue the bank.

§ 164. **Check distinguished from a bill of exchange.**— A check may be defined to be a draft or order, having essentially the characteristics of a bill of exchange, and differing from the bill (1) in being drawn on a bank or banker, (2) apparently and presumptively against a deposit of funds, and (3) payable on demand and without days of grace. In other particulars, checks may be said to resemble bills of exchange, except so far as other points of differentiation may be explained in the succeeding paragraphs.

§ 165. **Checks are drawn on a bank or banker.**— When one deposits money at a bank or with a banker, he does so with the implied, if not expressed, agreement on the part of the bank or banker, that all orders for the payment of money to a third person, drawn by the depositor against the deposit, will be paid on demand, as long as the fund on deposit has not been exhausted by such drafts or order. In the case of a bill of exchange, which is drawn by a creditor on some debtor, there is no prior agreement to pay any money to a third person on account of the indebtedness

due to the drawer. This constitutes one of the important distinctions between a bill of exchange and a check. Hence the proposition, that a check must be drawn on a corporation or person, sustaining to the party drawing the obligation of a bank or banker.[1] But the other essential characteristics of a check must also be present, in order that an order on a bank or banker may be properly described as a check. A strictly so-called bill of exchange may be drawn on a bank or banker.[2]

It is presumed that, when one draws on a bank or banker, the check is drawn against a fund on deposit. But while there is authority for the statement that an order for the payment of money, drawn against a bank or banker, with whom there is no fund on deposit, is a bill of exchange and not a check;[3] and presumably, this is the general rule, where the drawer never did have a deposit account with the drawee; yet, probably, it may be accepted as a well-settled rule, that the temporary want of a sufficient deposit fund would not make the order on a bank or banker any less a check. And, in any case, the lack of a fund of deposit would not change the character of the order, as against a bona fide holder.[4]

§ 166. **Check payable on demand without grace.**— Although there are cases, which hold that a check may be made payable at a future day, or in any other way than on demand;[5] the weight of authority is in favor of recognizing,

[1] Espy *v.* Bk. of Cincinnati, 18 Wall. 604; Merchants' Bank *v.* State Bank, 10 Wall. 604; Bowen *v.* Newell, 8 N. Y. 190; s. c. 13 N. Y. 290 (64 Am. Dec. 550).

[2] Georgia Nat. Bk. *v.* Henderson, 46 Ga. 487 (12 Am. Rep. 590).

[3] Planters' Bk. *v.* Kesee, 7 Heisk. 200; Keene *v.* Beard, 8 C. B. N. S. 372.

[4] Espy *v.* Bank of Cincinnati, 18 Wall. 604; Champion *v.* Gordon, 70 Pa. St. 474 (10 Am. Rep. 681): Morrison *v.* Bailey, 5 Ohio St. 13 (64 Am. Dec. 632); Newman *v.* Kaufman, 28 La. Ann. 865 (26 Am. Rep. 114).

[5] Westminster Bk. *v.* Wheaton, 4 R. I. 30; Way *v.* Towle, 155 Mass. 374 (29 N. E. 506); Matter of Brown, 2 Story, 502; Bowen *v.* Newell, 13 N. Y. 290 (64 Am. Dec. 550 (the conclusion being made to rest on local business custom); Champion *v.* Gordon, 70 Pa. St. 474 (10 Am. Rep. 681) (do.).

as one of the indispensable requirements of a check, that it be payable on demand and without days of grace.[1]

§ 167. **The form and formalities of the check.**— The form and formalities of the check differ but little from those of a bill of exchange. Like other kinds of commercial paper, the check contains a date, although it is not essential to its validity.[2] And it is a rather common occurrence for a check to be post-dated, *i. e.*, to bear date at a later day than that on which it is actually negotiated. The purpose of post-dating a check is to enable it to be negotiated immediately, while it is not payable until the future day; having, as to the time of payment the effect of a bill of exchange, but in other respects that of a check.[3] While the bank may pay a post-dated check before its date to its real owner it cannot debit the account of the depositor before the given date; and it takes the check subject to the subsequent proof of title in another, where the check is payable to bearer.[4]

All the various requisites of negotiable paper, as they have been explained in Chapter II, must be complied with in the case of a check;[5] such as payment in money, and certainty as to amount, time and the person to whom payment shall be made. Words of negotiability are required to make a check negotiable; but their absence does not affect the character of the check other than to

[1] Bradley *v.* Delaplaine, 5 Harr. 305; Andrew *v.* Blackley, 11 Ohio St. 89; Georgia Nat. Bank *v.* Henderson, 46 Ga. 487 (12 Am. Rep. 590); Wood River Bk. *v.* First Nat. Bk., 36 Neb. 744 (55 N. W. 239); Ivory *v.* Bk. of the State, 36 Mo. 475 (88 Am. Dec. 150); Harrison *v.* Nicollet Nat. Bk., 41 Minn. 488 (43 N. W. 336); Minturn *v.* Fisher, 4 Cal. 35; Brown *v.* Lusk, 4 Yerg. 210.

[2] Exchange Bk. *v.* Sutton Bk., 78 Md. 577 (28 A. 563).

[3] Salter *v.* Burt, 20 Wend. 205 (32 Am. Dec. 530); Matter of Brown, 2 Story, 502; Taylor *v.* Sip, 29 N. J. L. (1 Vroom.) 284.

[4] Wheeler *v.* Guild, 20 Pick. 545 (32 Am. Dec. 231); Bristol Knife Co. *v.* First Nat. Bk., 41 Conn. 421 (19 Am. Rep. 517); Second Nat. Bk. *v.* Averill, 2 App. D. C. 470.

[5] See Smith *v.* Smith, 1 R. I. 398 (53 Am. Dec. 652); Northrop *v.* Sanborn, 22 Vt. 433 (54 Am. Dec. 83); Wells *v.* Brigham, 6 Cush. 6 (52 Am. Dec. 750); Corgan *v.* Frew, 39 Ill. 31 (89 Am. Dec. 286).

make it non-negotiable.[1] It was once the English law that a bank was not obliged to honor a check which was payable to order;[2] and the act of Parliament, making the change in the law, only requires the banks to honor such checks, but relieves them of all liability, if they should make payment on such a check on a forged indorsement to the wrong person. But in the United States, banks are universally required by custom to honor checks payable to order, and pay them at their peril to any other persons than those to whom they are made payable, or to whom they have been duly indorsed by the original payee or indorsee.[3] But if payment is made to the rightful holder, it will be a good debit to the account of the depositor, although it is payable to order and has not been indorsed by him.[4]

In respect to the address of the drawee, the check differs somewhat from a bill of exchange. In a bill of exchange, the drawee's address is almost invariably in the left-hand corner, at the bottom. In a check, the address of the bank is usually written or printed in large letters across the top, just below the date and place of execution. But this is not an essential difference; and the character of the order or draft is in nowise affected by any departure from custom in this respect.[5]

§ 168. **Certification of checks.**— Since the check is intended to be paid immediately and on demand, the parties cannot be said to have contemplated any presentment for acceptance, it being payable whenever there is a presentment for any purpose. There is, therefore, no authority from the drawer to the payee to secure acceptance of a

[1] See Exchange Bk. *v.* Sutton Bk., 78 Md. 577 (28 A. 563).

[2] Bellamy *v.* Majoribanks, 8 Eng. L. & Eq. 517.

[3] Bowen *v.* Newell, 8 N. Y. 190; Graves *v.* Am. Exch. Bank, 17 N. Y. 205; Seventh Nat. Bank *v.* Cook, 73 Pa. St. 483 (13 Am. Rep. 751); Dodge *v.* Nat. Exch. Bk., 30 Ohio St. 1; McIntosh *v.* Lytle, 23 Minn. 336 (37 Am. Rep. 410).

[4] Freund *v.* Imp. & Trad. N. Bk., 76 N. Y. 352.

[5] Kavanaugh *v.* Farmers' Bk. of Maitland, 59 Mo. App. 540; Bull *v.* First Nat. Bk., 123 U. S. 105.

check and put it in circulation, as is universally true in the case of a bill of exchange. Yet the necessities of the commercial world have required this to some degree. A custom has grown up, and lately assumed immense proportions in the large commercial centers, for the bank, on which a check is drawn, to enter into a positive agreement with the holder to pay the check whenever it is presented. This is called the *certification* of the check.

Certification has been said to be "the equivalent of acceptance."[1] But this is not strictly true in every particular; and the effect of certification varies materially according to the circumstances. If the certification is given by the bank, at the solicitation of the holder, the drawer and prior indorsers are completely discharged from all liability for the payment of the check, and the holder must look solely to the bank.[2] But if the bank certifies the check at the request of the drawer, and before its delivery to the payee, the drawer is still liable, and the certification has the same effect as does the acceptance of a bill of exchange.[3] In every other respect, the certification is the equivalent of acceptance. The bank, on certifying a check, is precluded from afterwards questioning the genuineness of the drawer's signature, as against the claims of a *bona fide* holder, although it does not guarantee that the body of the bill or indorsements are genuine.[4] Nor can the bank afterwards refuse to pay the

[1] Merchants' Bank *v.* State Bk., 10 Wall. 604, 647.

[2] First Nat. Bk. *v.* Leach, 52 N. Y. 350 (11 Am. Rep. 708); Seventh Nat. Bank *v.* Coot, 73 Pa. St. 483 (13 Am. Rep. 751); Girard Bk. *v.* Bk. of Penn. Twp., 39 Pa. St. 92; Metropolitan N. Bk. *v.* Jones, 137 Ill. 634 (27 N. E. 533); Cont. Nat. Bk. *v.* Cornhauser, 37 Ill. App. 475; Essex Co. N. Bk. *v.* Bk of Montreal, 7 Biss. 197; Bullard *v.* Randall, 1 Gray, 605 (61 Am. Dec. 433).

[3] Minot *v.* Russ, 156 Mass. 458 (31 N. E. 489); Randolph N. Bk. *v.* Hornblower, 160 Mass. 401 (35 N. E. 850); Cincinnati &c. Fish Co. *v.* Nat. Lafayette Bank, 51 Ohio St. 106 (36 N. E. 833).

[4] Espy *v.* Bk. of Cincinnati, 18 Wall. 604; Security Bk. *v.* Continental Bk., 64 N. Y. 316; Clews *v.* N. Y. Nat. Bk. Assn., 89 N. Y. 418 (42 Am. Rep. 303); First Nat. Bk. *v.* N. W. Nat. Bk., 40 Ill. App. 640; s. c. 152 Ill. 296 (38 N. E. 739).

check, because there were no funds on deposit to cover the check; although, if the check has been certified to by mistake, the certification can be recalled, if it is done before the check has been further negotiated.[1]

The customary form of certification of a check is for some duly authorized officer of the bank to write across the face of the check the word "good" or "certified" and sign his name or write his initials.[2] But the form does not appear to be of any great moment. It may be written on a separate paper, or may be communicated by telegraph.[3] And it seems that, in the absence of statutory requirement to the contrary, a verbal certification will bind the bank, if it be communicated to the payee or other holder of the check.[4]

In the absence of express authorization, by the board of directors of a bank, the only officers who have impliedly the authority to bind the bank by the certification of a check, are the president, cashier and teller.[5] But no officer

[1] Irving Bk. *v.* Wetherald, 36 N. Y. 335; Watervliet Bank *v.* White, 1 Denio, 608; Bk. of Republic *v.* Baxter, 31 Vt. 101; Second Nat. Bk. *v.* West Nat. Bk., 51 Md. 128 (34 Am. Rep. 300). The certification is not absolutely binding on the bank, except as against a *bona fide* holder. Where, therefore, a certified check, payable to order, is transferred without indorsement, the subsequent holders cannot hold the bank liable, where the certification has been procured by fraud or misrepresentation. Goshen Nat. Bk. *v.* Bingham, 118 N. Y. 349 (23 N. E. 180). And in any case, the holder must prove title. Lynch *v.* First Nat. Bk., 107 N. Y. 179 (13 N. E. 775).

[2] Barnet *v.* Smith, 30 N. H. 256 (64 Am. Dec. 290).

[3] Henrietta Nat. Bk. *v.* State Nat. Bk., 80 Tex. 648 (16 S. W. 321).

[4] Carr *v.* Nat. Security Bk., 107 Mass. 45 (9 Am. Rep. 6); Pope *v.* Bank of Albion, 59 Barb. 226; National State Bk. *v.* Linderman, 161 Pa. St. 199 (statute requiring writing) (28 A. 1022); Nelson *v.* First Nat. Bank, 48 Ill. 36 (95 Am. Dec. 510); Garretson *v.* North Atchison Bk., 39 Fed. 163; 47 Fed. 867 (telegram). But see *contra*, Espy *v.* Bank of Cincinnati, 18 Wall. 604; Farmers' & Trad. Bk. *v.* Carter Co., 88 Tenn. 279 (12 S. W. 545); Kahn *v.* Walton, 46 Ohio St. 195 (20 N. E. 203), holding that a verbal statement that a check is good, does not necessarily involve a positive promise that it will be paid.

[5] Merchant's Bk. *v.* State Bk., 10 Wall. 604; Meads *v.* Merchants' Bk. of Albany 25 N. Y. 143; Claflin *v.* Farmers' &c. Bk., 25 N. Y. 293; Cooke *v.* State Nat. Bk., 52 N. Y. 96 (11 Am. Rep. 667). But see Atlantic Bk. *v.* Merchants' Bk., 10 Gray, 532.

has the authority to certify a check drawn by one who has not sufficient funds on deposit to cover it, and no one but a *bona fide* holder can hold the bank liable on such a certification.[1] Nor can any officer of a bank certify a post-dated check prior to the given date of the check.[2]

The certification of a check does not give the holder any specific lien on the assets of the bank.[3]

§ 169. **Negotiation and transfer of checks.**— Like bills of exchange and promissory notes, a check, payable to bearer, is transferable by delivery without indorsement. And while it is more or less customary for a bank to ask for the indorsement of the person to whom payment is made, such indorsement is only intended to secure evidence and identification of the payee, and does not impose upon him the liability of an indorser, unless it is shown that he signed *animo indorsandi*. If the check is payable to order, indorsement by the payee and indorsees is necessary to the transfer of the full legal title to the check.[4]

§ 170. **Memorandum checks.**— A peculiar form of check has come into use in certain business communities, which is known as the memorandum check. This is described to be "a contract by which the maker engages to pay the *bona fide* holder absolutely, and not upon a condition to pay upon presentation at maturity, and if due notice of the presentation and non-payment should be given. The word 'memorandum,' written or printed upon the check, describes the nature of the contract with precision."[5] It is in the nature of a due bill, the only material dif-

[1] Atlantic Bk. *v.* Merchants' Bk., 10 Gray, 532; Cooke *v.* State Nat. Bk., 52 N. Y. 96 (11 Am. Rep. 667).

[2] Clarke Nat. Bk. *v.* Bk. of Albion, 52 Barb. 592.

[3] People *v.* St. Nicholas Bk., 77 Hun, 159.

[4] Hoyt *v.* Seeley, 18 Conn. 353; Keene *v.* Beard, 8 C. B. N. S. 372; Cruger *v.* Armstrong, 3 Johns. 5 (2 Am. Dec. 126); Conroy *v.* Warren, 3 Johns. 259 (2 Am. Dec. 156); Merchants' Bk. *v.* Spicer, 6 Wend. 445; Glen *v.* Noble, 1 Blatchf. 105; Humphries *v.* Bicknell, 2 Litt. 296 (13 Am Dec. 268).

[5] Franklin Bk. *v.* Freeman, 16 Pick. 535.

ference being that the bank, whose name appears upon the check, is impliedly authorized by the maker to pay it like any ordinary check, and to debit the depositor's account with the amount.[1]

§ 171. **Presentment, notice and protest of checks.**— Except in the case of memorandum checks, it is as necessary, in order to hold the drawer and indorsers, to observe the rules in respect to presentment for payment, protest and notice of dishonor, where the instrument is a check, as where it is a bill of exchange or promissory note.[2] But there is this difference between bills and checks as to consequences of negligence, or delay in demand and notice. Inasmuch as checks are payable on demand, the drawer is not discharged by any such delay or neglect, unless actual damage can be proved by him; as, for example, by proof of the failure of the bank after the negotiation of the check, and after the lapse of a reasonable time, within which the check could have been presented for payment. If the bank has not failed, the check is payable whenever presented, and the drawer is not discharged by the delay.[3]

[1] United States *v.* Isham, 17 Wall. 496; Cushing *v.* Gore, 15 Mass. 69; Kelly *v.* Brown, 5 Gray, 108; Skillman *v.* Titus, 3 Vroom (31 N. J. L.) 96; Am. Emigrant Co. *v.* Clark, 47 Iowa, 671; Dykers *v.* Leather Mfg. Co., 11 Paige, 612. The bank's name may be canceled; and if it is, the party holding the check must prove the consideration affirmatively. The presumption of consideration is destroyed by such cancellation. Ball *v.* Allen, 15 Mass. 433; Ellis *v.* Wheeler, 3 Pick. 18.

[2] Merchants' Bk. *v.* State, 10 Wall. 604; Hoyt *v.* Seeley, 18 Conn. 353; Harker *v.* Anderson, 21 Wend. 372; Cruger *v.* Armstrong, 3 Johns. 5 (2 Am. Dec. 126); Pollard *v.* Bowen, 57 Ind. 234; Jones *v.* Heiliger, 36 Wis. 149.

[3] Bull *v.* First Nat. Bk., 123 U. S. 105; Burkhalter *v.* Second Nat. Bk., 42 N. Y. 538; Mohawk Bk. *v.* Broderick, 10 Wend. 309; 13 Wend. 133 (27 Am. Dec. 192); National State Bk. *v.* Weil, 141 Pa. St. 457 (21 A. 661); Taylor *v.* Sip, 29 N. J. L. (1 Vroom) 284; Exchange Bk. *v.* Sutton Bk., 78 Md. 577 (28 A. 563); Purcell *v.* Allemong, 22 Gratt. 739; Stewart *v.* Smith, 17 Ohio St. 83; Heartt *v.* Rhodes, 66 Ill. 351; Stevens *v.* Park, 73 Ill. 387; Lowenstein *v.* Bresler, 109 Ala. 326 (19 So. 860); Watt *v.* Gans (Ala. '97), 21 So. 1011; Morrison *v.* McCartney, 30 Mo. 183; Offutt *v.* Rucker, 2 Ind. App. 316; Cork *v.* Bacon, 45 Wis. 192 (30 Am. Rep. 712); First Nat. Bank *v* Linn Co. (Oreg. '97), 47 P. 614; Shaffer *v.* Maddox, 9

But the indorsers are absolutely discharged, if there has not been due presentment, protest and notice within a reasonable time, whether there has been any actual damage or not.[1]

§ 172. **Within what time must check be presented.** — Inasmuch as the failure of the bank before presentment is the principal, if not the invariable, occasion of loss from a neglect or delay in making presentment for payment, almost any delay is likely to produce the loss; and, consequently, but a limited time is given to the holder in which to make presentment, the length of time varying according to the method of negotiation of the check, and the other circumstances of the particular case. The fundamental idea is that a check is not to be held in possession by the same person for any great length of time, as is permissible in the case of a bill or note. A payee is obliged to pass the check by transfer to another, or by presentment to the bank, within twenty-four hours after his receipt of it.

If the drawer and payee live in the same place in which the bank is located, the payee has the next day, in which to make presentment for payment, if he does not transfer it to another person. If he holds possession of the check for more than one day, and the bank fails, he loses his remedy against the drawer of the check.[2] Where the payee

Neb. 205 (2 N. W. 464). But see Tomlin *v.* Thornton (Ga. '96); 27 S. E. 147.

[1] Merchants' Bk. *v.* Spicer, 6 Wend. 445; Murray *v.* Judah, 6 Cow. 490; Little *v.* Phoenix Bank, 2 Hill, 425; Leonard *v.* Olson (Iowa, '96), 68 N. W. 677; Humphries *v.* Bicknell, 2 Litt, 296 (13 Am. Dec. 268); Simpson *v.* Pac. &c. Ins. Co., 44 Cal. 143, and cases cited in the preceding and succeeding notes.

[2] O'Brien *v.* Smith, 1 Black, 99; Smith, *v.* Miller, 43 N. Y. 171 (3 Am. Rep. 690); Syracuse &c. R. R. Co. *v.* Collins, 57 N. Y. 641; aff'g 3 Lans. 29; Cox *v.* Boone, 8 W. Va. 500 (23 Am. Rep. 627); Morrison *v.* Bailey, 5 Ohio St. 13 (64 Am. Dec. 632); Bickford *v.* First Nat. Bk., 42 Ill. 238 (89 Am. Dec. 436); Cawein *v.* Browinski, 6 Bush, 457 (99 Am. Dec. 684); Holmes *v.* Roe, 62 Mich. 199 (28 N. W. 864); Simpson *v.* Pac. &c. Ins. Co., 44 Cal. 143; Grange *v.* Reigh (Wis.), 67 N. W. 1130; Andrews *v.* Germ. Nat. Bank, 9 Heisk. 211 (24 Am. Rep. 300).

receives the check at a distance from the place where the bank is situated, he has the whole of the day after receiving it in which to forward the check for presentment through an appropriate channel, by mail or express, to the place where the bank is located. And the person who receives it has the next day after receiving it, in which to make presentment. Any loss, arising from failure of the bank during the time needed and consumed in the transportation of the check, will fall on the drawer.[1] And where the banking custom of the place, where the bank is located, is to make presentment through the clearing-house, the consequent delay is justifiable; and the collecting bank or holder of the check is not liable if the drawee bank fails, while the check is passing through the clearing-house.[2]

But the payee of a check need not send it direct to the bank for presentment. He may transfer it by indorsement or delivery to another. And the indorsee or transferee has the next day after receiving the check, in which to present for payment or to forward it for presentment. But if more time has elapsed between the original negotiation of the check and its final presentment for payment by the indorsee or holder than what is allowed by law to the payee, the drawer is discharged, in case of the intermediate failure of the bank, although the immediate indorser is still bound. The law does not permit any extension of the risk of the drawer by a series of transfers by indorsement or by delivery. The check is designed for immediate presentment, and not for circulation.[3]

[1] Smith v. Jones, 20 Wend. 192 (32 Am. Dec. 527); Gregg v. Beane (Vt. '97), 37 A. 248; Loux v. Fox, 171 Pa. St. 68 (32 A. 190); First Nat. Bk. v. Buckhannon Bk., 80 Md. 475 (31 A. 302). It seems, however, that, where the payee resides in the country, away from the place in which the bank is located, a longer time than twenty-four hours is allowed within which to make presentment. Cox v. Boone, 8 W. Va. 500 (23 Am. Rep. 627).

[2] Willis v. Finley, 173 Pa. St. 28 (34 A. 213); *contra*, Holmes v. Roe, 62 Mich. 199 (28 N. W. 864.)

[3] Cruger v. Armstrong, 3 Johns. 5 (2 Am. Dec. 126); Mohawk Bk. v. Broderick, 10 Wend. 304; 13 Wend. 133 (27 Am. Dec. 192); Rosenthal v. Ehrlicher, 154 Pa. St. 396 (26 A. 435); First Nat. Bk. v. Miller, 43 Neb.

§ 173. **Presentment of check by mail and by deposit.**— It is probably correct to say that the ordinary method of forwarding a check for presentment, where it is negotiated at a distance from the place where the bank is situated, is by mail or express to some third person or independent bank or banker, who is charged with the duty of presenting the check for payment to the bank or banker on which it is drawn. But a custom has grown up of late to send the check direct to the bank on which it is drawn, particularly where the paying bank is the correspondent of the receiving bank, or it is the only bank in the place of its location. The propriety and sufficiency of this method of presentment has been denied,[1] but equally weighty authority justify its adoption.[2] It is also a very common practice for one depositor to deposit to his account a check drawn in his favor by another depositor. In such a case, the bank assumes the dual obligation of collecting and paying the check. And if the account of the drawer does not permit of its payment, it has been held that the check may be returned to the depositor, although its amount has been passed to his credit.[3]

Where, however, checks are received for collection by the bank on which they are drawn, the bank has until the next day to return the checks, if they are not to be paid.[4] If the account of the drawer of a number of checks does

791 (62 N. W. 195); Hamilton *v.* Winona Salt. &c. Co , 95 Mich. 436 (54 N. W. 903); Brown *v.* Lusk, 4 Yerg. 210; Gifford *v.* Hardell, 88 Wis. 538 (60 N. W. 1064); Reid *v.* Reid, 11 Tex. 584; Industrial Tr. &c. Sav. Co. *v.* Weakley, 103 Ala. 458 (15 So. 854); Watt *v.* Gans (Ala. '97), 21 So. 1011.

[1] Farwell *v.* Curtis, 7 Biss. 160; Wagner *v.* Crook, 167 Pa. St. 259; 31 A. 576 (collecting bank liable for any loss); Anderson *v.* Rogers, 53 Kan. 542 (36 P. 1067).

[2] Shipsey *v.* Bowery Nat. Bk., 59 N. Y. 485: Indig *v.* Nat. City Bank, 80 N. Y. 100; Nebraska N. Bk. *v.* Logan, 35 Neb. 182 (52 N. W. 808).

[3] Nat. Gold Bk. *v.* McDonald, 51 Cal. 64 (21 Am. Rep. 697). But see *contra*, Pratt *v.* Foote, 9 N. Y. 463; Oddie *v.* Nat. City Bk , 45 N. Y. 735 (6 Am. Rep. 160).

[4] Oberman *v.* Hoboken City Bk., 2 Vroom (30 N. J. L.), 563; Merchants' Nat. Bk. *v.* Eagle Nat. Bk., 101 Mass. 281 (100 Am. Dec. 120).

not show a sufficient balance to pay all the checks, which may be presented at one time, the duty of the bank is to pay the checks in full, in the order in which they have been presented for payment or received for deposit or collection, and not to distribute the balance *pro rata* among the checkholders.[1]

§ 174. **What will excuse failure or delay in demand and notice.**— As a general proposition, it may be stated that the same causes or occurrences, which will excuse failure or delay in the due presentment and protest of bills and notes, and in the notification of their dishonor, apply to similar cases arising in the negotiation and handling of checks. And the reader is referred to a preceding chapter[2] for a general discussion of these satisfactory excuses. The most common excuses in the cases of checks, as against the drawer, are the insolvency of the bank on which the check is drawn, and the absence of funds on deposit to the credit of the drawer. Either fact, when known to the holder, will excuse his failure to make presentment.[3] The holder is also excused from demand and notice, as against the drawer, if he has countermanded the payment of the check, or drawn out the funds on deposit at the bank.[4]

[1] Matter of Brown, 2 Story, 503; Nat. Safe & Lock Co. *v.* People, 50 Ill. App. 336. And if two checks are presented simultaneously which aggregate more than the balance to the credit of the drawer, the bank may refuse to pay both. Dykers *v.* Leather M'f'g Bk., 11 Paige, 612.

[2] Chapter XIII.

[3] Beauregard *v.* Knowlton, 156 Mass. 395 (31 N. E. 389); Hoyt *v.* Seeley, 18 Conn. 353; Conroy *v.* Warren, 3 Johns. 259 (2 Am. Dec. 156); Brush *v.* Barrett, 82 N. Y. 400; Exchange Bk. *v.* Sutton Bk., 78 Md. 577 (28 A. 563); Kirkpatrick *v.* Puryear, 93 Tenn. 409 (24 S. W. 1130); Fletcher *v.* Pierson, 69 Ind. 281 (35 Am. Rep. 214); Culver *v.* Marks, 122 Ind. 554 (23 N. E. 1086); Kinyon *v.* Stanton, 44 Wis. 479 (28 Am. Rep. 601); Leonard *v.* Olson (Iowa, '97), 68 N. W. 677. But see First Nat. Bk. *v.* Miller, 37 Neb. 500 (55 N. W. 1064).

[4] Jacks *v.* Darrin, 3 E. D. Smith, 558; Industrial Bank of Chicago *v.* Bowes, 165 Ill. 70 (46 N. E. 10); Whaley *v.* Houston, 12 La. Ann. 585; Minturn *v.* Fisher, 7 Cal. 573.

§ 175. **When is a check stale or overdue.**— In a preceding section,[1] it was explained what expedition in the presentment of a check for payment was required by the law, in order to hold the drawer and indorser liable, where the bank had failed in the meanwhile, or where for any other reason damage has been suffered by the drawer of the check in consequence of such delay. But where no such loss or damage is thereby incurred by the drawer, the delay in presentment does not discharge either the drawer or indorser. The natural inference from that exposition of the law would be that a check is always due and payable, whenever presented, it matters not how long the delay in presentment continues, short of the statutory period of limitation. And this is true, where the check is not subject to some defense which could be successfully set up against the payee. In other words, in order that an indorsee or transferee of a check may claim the protection of a *bona fide* holder, and the right to hold and enforce the check, free from the defenses not appearing on its face, the check must have been transferred within a reasonable time after its original negotiation. Generally stated, the lapse of time must not have been so long that in the light of the circumstances of the particular case, it is sufficient to arouse the suspicions of a reasonably prudent man of the existence of some defense to the enforcement of the check. The actual length of time, which would be considered sufficient to make the check stale or overdue, varies with the circumstances of each case.[2]

But the time of the delay is computed from the actual

[1] § 171.

[2] First Nat. Bk. *v.* Harris, 108 Mass. 514 (four days, not overdue); Ames *v.* Merriam, 98 Mass. 294 (ten days, not overdue); Cowing *v.* Altman, 71 N. Y. 435 (27 Am. Rep. 70) (one year, stale); Davis *v.* Dayton, 27 N. Y. S. 969; 7 Misc. 488 (two days, not overdue); Skillman *v.* Titus, 3 Vroom. (31 N. J. L.) 96 (2½ years, stale); First Nat. Bk. *v.* Needham, 29 Iowa, 249 (six months, stale); Himmelman *v.* Hotaling, 40 Cal. 111 (6 Am. Rep. 600) (one day, not overdue); Estes *v.* Lovering Shoe Co., 59 Minn. 504; 61 N. W. 674 (several days).

day of the original negotiation, and not from the given date of the check.[1]

§ 176. **Effect of death of drawer.**— Although there is authority for the proposition that the death of the drawer of a check revokes the authority of the bank to honor it,[2] and the banks very generally refuse to honor checks, after they have learned of the death of the drawer; yet it seems that, where the check is based upon a valuable consideration, there is really no such revocation, and the holder may enforce the contract evidenced by it as if the drawer were still alive. But if it is not supported by a valuable consideration, the death of the drawer works a complete revocation of the check.[3] In those States, in which a checkholder is held to have a cause of action against a bank on an uncertified check,[4] it is to be presumed that the bank can be compelled to pay the check, notwithstanding the intermediate death of the drawer.

§ 177. **Right of the checkholder to sue the bank.**— In a previous section[5] it has been explained how far and under what circumstances the payee of an unaccepted bill of exchange may sue the drawee, on the theory that a bill of exchange operates as an assignment *pro tanto* of the fund or debt against which the bill is drawn. The same question arises in respect to the right of the checkholder to sue the bank on the same theory. It is not necessary to restate what was explained in the preceding section[6] in reference to bills of exchange, and that section and this should be read together. In respect to the sufficiency of the theory of an equitable assignment *pro tanto*,

[1] Cowing *v.* Altman, 71 N. Y. 436 (27 Am. Rep. 70); Gifford *v.* Hardell, 88 Wis. 538 (60 N. W. 1064).

[2] Morse on Banking, 260.

[3] Cutts *v.* Perkins, 12 Mass. 206; Debesse *v.* Napier, 1 McCord, 106 (10 Am. Dec. 658); Burke *v.* Bishop, 27 La. Ann. 465 (21 Am. Rep. 567). See *ante*, § 82, as to the invalidity of a gift *causa mortis* of the donor's check.

[4] As to which see *post*, § 177.

[5] § 5.

[6] § 5.

there is a material difference between bills of exchange and checks, growing out of the implied agreement of the bank to pay the checks of its depositors for any amount, large or small, as long as a sufficient balance remains to the credit of the depositor. This agreement is almost equivalent to an acceptance; and, at any rate, removes the objection,— which is raised to the application of the theory of equitable assignment *pro tanto* to bills of exchange, where the whole of the fund or deposit is not called for,— that the creditor is making a new bill by the drawing of the check for a smaller amount, without the previous consent of the bank. For this reason, we find a few of the courts holding, that the holder of a check may sue the bank on the check if there is a sufficient balance to the credit of the drawer, as long as it has not been countermanded, as fully and as freely as he may sue the drawer; on the theory that the check operates as an assignment *pro tanto* to the checkholder of the deposit, against which it is drawn.[1] But the trend of judicial opinion is against the acceptance of this theory; and it may now be received as the generally accepted American doctrine; that a checkholder cannot sue the bank on an uncertified check, however plethoric the condition of the drawer's deposit might be.[2]

[1] Fogarties *v.* State Bk., 12 Rich. L. 518 (78 Am. Dec. 468); Simmons Hardware Co. *v.* Bk. of Greenwood, 41 S. C. 177 (19 S. E. 502); Lester *v.* Given, 8 Bush, 358; Bank of Antigo *v.* Union Tr. Co., 149 Ill. 343 (36 N. E. 1029); Union Nat. Bk. *v.* Oceana Co. Bk., 80 Ill. 212 (22 Am. Rep. 185); Springfield Marine Bk. *v.* Mitchell, 48 Ill. App. 486 (action sustained, where there was no deposit, but bank had agreed to honor check); Roberts *v.* Corbin, 26 Iowa, 315; Snedden *v.* Harmes, 5 Colo. App. 477 (39 P. 68).

[2] Bk. of the Republic *v.* Millard, 10 Wall. 152; Florence Min. Co. *v.* Brown, 124 U. S. 385; Carr *v.* Nat. Security Bk., 107 Mass. 45 (9 Am. Rep. 6); Aetna Nat. Bk. *v.* Fourth Nat. Bk., 46 N. Y. 82 (7 Am. Rep. 314); Atty.-General *v.* Cont. L. Ins. Co., 71 N. Y. 325 (27 Am. Rep. 55); First Nat. Bk. *v.* Shoemaker, 117 Pa. St. 94 (11 A. 304), Moses *v.* Franklin Bk., 34 Md. 581; Purcell *v.* Allemong, 22 Gratt. 742; Commercial N. Bk. *v.* First Nat. Bk., 118 N. C. 783 (24 S. E. 524); Mayer *v.* Chattahoochie Nat. Bk., 51 Ga. 325; Simmons *v.* Cincinnati Sav. Soc., 31 Ohio St. 457 (27 Am. Rep. 521); Harrison *v.* Wright, 100 Ind. 515 (58 Am. Rep. 805); Case

ILLUSTRATIVE CASES.

Henrietta Nat. Bank *v.* State Nat. Bank, 80 Tex. 648 (16 S. W. 321).
Minot *v.* Russ, 156 Mass. 458 (31 N. E. 489).
Mohawk Bank *v.* Broderick, 10 Wend. 304.
O'Brien *v.* Grant, 146 N. Y. 163 (40 N. E. 871).
Bank of Antiago *v.* Union Trust Co., 149 Ill. 343 (36 N. E. 1029).

Telegraphic Promise to Pay Check Constitutes a Good Certification or Acceptance and Bank is Liable Thereon.

Henrietta Nat. Bank *v.* State Nat. Bank, 80 Tex. 648 (16 S. W. 321).

Gaines, J. This suit was brought by the appellee to recover of the Henrietta National Bank and Frank Brown, its receiver, the amount of a check drawn upon it by E. F. & W. S. Ikard. On the 22d of July, 1887, E. F. & W. S. Ikard drew a check on the defendant bank in favor of one T. F. West for $1,800. West indorsed and delivered it to one Atkinson, who on the next day presented it to the cashier of the plaintiff bank at Ft. Worth, with the request that he cash it. The cashier immediately telegraphed the defendant bank as follows: "Will you pay E. F. & W. S. Ikard's check for eighteen hundred dollars on presentation?" The cashier of the defendant bank on the same day replied by telegram: "Yes; will pay the Ikard check." Upon the receipt of this telegram the plaintiff discounted the paper, and the holder transferred it to the bank by indorsement and delivery. The check was immediately sent by mail to the defendant bank, with a request to remit the amount to the plaintiff. The letter reached Henrietta on Sunday, and on Monday, before banking hours, the directors of the defendant bank determined to suspend payment, and thereafter its doors were not opened for regular business. The court having given judgment for the plaintiff for the full amount of the check and interest, and the defendants having appealed, they now complain in effect that the correspondence by telegraph between the two banks did not sufficiently describe the check, so as to make the promise of the defendant bank an acceptance. The authority mainly relied upon by appellant's counsel in support of their contention is the case of Coolidge *v.* Payson, 2 Wheat. 66. In that case Chief Justice Marshall says: "Upon a review of the cases which are reported, this court is of the opinion that a letter written within a reasonable time before or after the date of a bill of exchange, describing it in terms not to be mistaken, and promising to accept it, is, if shown to the person, who afterwards takes the bill on the credit

v. Henderson, 23 La. Ann. 49 (8 Am. Rep. 590); Dickinson *v.* Coates, 79 Mo. 251 (49 Am. Rep. 228); Hopkinson *v.* Forster, L. R. 19 Eq. 74. For a fuller statement of the argument in favor of the theory of equitable assignment see Tiedeman Com. Paper, § 452.

of the letter, a virtual acceptance, binding the person who makes the promise." The doctrine was reaffirmed in the same court in the cases of Schimmelpennich *v.* Bayard, 1 Pet. 284, and Boyce *v.* Edwards, 4 Pet. 111, and has been frequently followed in other courts. Whether, according to the rule laid down, the correspondence should show any more than the amount and character of the bill as to the time of payment, we need not here inquire, though it would seem that such a description ought to be sufficient, according to the most rigid rule recognized by any court. The rule, however, applies only to a case in which it is sought to charge the defendant as the acceptor of the bill. Cases may arise in which the party who has promised to accept, may be held liable upon the promise, although such promise may not be deemed equivalent to a formal acceptance. A practical difference between an action upon an acceptance and one upon a promise to accept, is that the former may be brought by the holder of the bill, while the latter suit can only be maintained by the party to whom the promise is made. In this case the promise to pay the bill was made directly to the plaintiff, and it was upon the faith of that promise that the check was discounted. The suit is not brought upon an alleged acceptance. The petition states the facts in detail, and seeks a recovery for the breach of the promise to pay the check. In Boyce *v.* Edwards, supra, the Supreme Court of the United States say: "The distinction between an action on a bill as an accepted bill and one founded on a breach of promise to accept, seems not to have been adverted to. But the evidence to support one or the other is materially different. To maintain the former, as has already been shown, the promise must be applied to the particular bill alleged in the declaration to have been accepted. In the latter, the evidence may be of a more general character, and the authority to draw may be collected from circumstances, and extended to all bills coming fairly within the scope of the promise." It is clear that the promise in the case before us was sufficiently definite to support an action for a failure or a refusal to pay the check described in the petition, if not sufficiently specific to authorize its being treated as an acceptance. The check offered in evidence contained the character and figures "$1,800.00," but in the body a line appeared to have been drawn through the word "hundred." If the word was intended to be erased, it was a check for $18; if not, it was a check for $1,800. The line appears to have been drawn along the top of the word, rather than through it, and it is not at all clear that, even without explanation, it should be held to be an erasion. The member of the firm who drew the check testified that it was intended to be a check for $1,800, and that he thought the line was upon the blank when the check was written. The circumstances attending the whole transaction leave no doubt that the purpose was to draw a check for the amount claimed by the plaintiff, and that the line was either upon

the paper when the check was drawn, and was not discovered, or that it was subsequently placed there by some accident. That it was competent to prove that a mark of this character was not intended as an erasure, especially when the figures in the margin tend to show the same fact, we have no doubt. Shars. Starkie Ev. 500. The defendant introduced testimony tending to show that a prudent banker would not have paid the check, at least without inquiry as to the intention of the drawers in executing it. This may be true, but, so far as this case is concerned, it is a fact of no importance. It was nevertheless the duty of the defendant bank to pay the check. An inquiry would have shown beyond doubt that it was a check for $1,800; and, though the apparent erasure may have justified a delay of a reasonable time to make inquiry, it did not justify a final refusal to pay. We find no error in the judgment, and it is affirmed.

Drawer Liable on Certified Check on Failure of the Bank, if He has it Certified before Delivery to Payee — Not Liable if the Payee Procures Certification.

Minot *v.* Russ, 156 Mass. 458 (31 N. E. 489).

Field, C. J. The first case is an appeal from a judgment rendered by the superior court for the defendant on his demurrer to the declaration. The defendant on October 29, 1891, drew a check on the Maverick National Bank payable to the order of the plaintiff, and, being informed by the plaintiff that the check must be certified by the bank before it would be received, the defendant on the same day presented the check to the bank for certification, and the bank certified it by writing on the face of the check the following: "Maverick National Bank. Pay only through clearing house. J. W. Work, Cashier. A. C. J., Paying Teller." After it was certified the check was, on Saturday, October 31, 1891, delivered by the defendant to the plaintiff for a valuable consideration. The declaration alleges that the bank stopped payment on Monday morning, November 2, 1891, "before the commencement of business hours of said day," and that on that day payment was duly demanded of the bank, and notice of nonpayment was duly given to the defendant. The second case is an appeal from a judgment rendered for the defendants by the superior court on an agreed statement of facts. On Saturday, October 31, 1891, the defendants drew their check on the Maverick National Bank, payable to the order of the plaintiffs, and delivered it to them in payment of stocks bought by the defendants of the plaintiffs. The check was received too late to be deposited by the plaintiffs for collection in season to be carried to the clearing house on that day, but during banking hours on that day the plaintiffs presented the check to the Maverick National Bank for certification, and the bank certified it by writing or stamping on its face the following: "Maverick

National Bank. Certified. Pay only through clearing house. C. C. Domett, A. Cashier. ———, Paying Teller." At that time the defendants had on deposit sufficient funds to pay the check, and the bank, on certification, charged to the defendants' account the amount of the check, and credited it to a ledger account called "Certified Checks," in accordance with their uniform custom. After certification, the plaintiffs on the same day deposited the check in the Hamilton National Bank for collection. It is agreed that if the check had been presented for payment on Saturday in banking hours it would have been paid; but the Maverick National Bank transacted no business after Saturday, and on Sunday the comptroller of the currency placed a National Bank examiner in charge, and the bank was put into the hands of a receiver. The clearing house on November 2d refused to receive checks on the Maverick National Bank, and the check was on that day duly presented for payment, and due notice of non-payment was given to the defendants. Each of the checks was in the ordinary form of checks on a bank, and they were payable on demand, and no presentment for acceptance or certification was necessary to charge the drawer. In a sense, undoubtedly, a check is a species of bill of exchange, and in a sense, also, it is a distinct commercial instrument, but according to the general understanding of merchants and according to our statutes these instruments were checks, and not bills of exchange. "A check is an order to pay the holder a sum of money at the bank on presentment of the check and demand of the money. No previous notice is necessary. No acceptance is required or expected. It has no days of grace. It is payable on presentment, and not before." Bullard *v.* Randall, 1 Gray, 603. The duty of the bank was to pay these checks when they were presented for payment if the drawers had sufficient funds on deposit. The bank owed no duty to the drawers to certify the checks, although it could certify them, if it saw fit, at the request of either the drawers or of the holders and if it certified them it became bound directly to the holders, or to the persons who should become the holders. In either case the bank would charge to the account of the drawer the amount of the check, because by certification it had become absolutely liable to pay the check when presented. When a check payable to another person than the drawer is presented by the drawer to the bank for certification, the bank knows that it has not been negotiated, and that it is not presented for payment, but that the drawer wishes the obligation of the bank to pay it to the holder when it is negotiated, in addition to his own obligation. But when the payee or holder of a check presents it for certification the bank knows that this is done for the convenience or security of the holder. The holder could demand payment if he chose, and it is only because instead of payment the holder desires certification that the bank certifies the check instead of paying it. In one case the bank certifies the check, for the use or convenience

of the drawer, and in the other for the use or convenience of the holder. In the present cases the checks were seasonably presented to the bank for payment, and on the facts stated the the defendants would be liable unless the certification discharged them from liability. It is argued that the certification of a check, whereby the bank becomes absolutely liable to pay it at any time on demand, discharges the drawer, because it is said that the check then becomes, in effect, a certificate of deposit; and it is also argued that the certification is, in effect, only an acceptance of a bill of exchange, and that if payment is duly demanded of the bank and refused, and notice of nonpayment duly given, the drawer is held. So far as the question has been considered, it has been decided that the certification of a bank check is not in all respects like the making of a certificate of deposit or the acceptance of a bill of exchange, but that it is a thing sui generis, and that the effect of it depends upon the person who, in his own behalf or for his own benefit, induces the bank to certify the check. The weight of authority is that if the drawer, in his own behalf, or for his own benefit gets his check certified, and then delivers it to the payee, the drawer is not discharged; but that if the payee or holder in his own behalf, or for his own benefit, gets it certified instead of getting it paid, then the drawer is discharged Born *v.* Bank, 123 Ind. 78; 24 N. E. Rep. 173; Brown *v.* Leckie, 43 Ill. 497; Rounds *v.* Smith, 42 Ill. 245; Andrews *v.* Bank, 9 Heisk. 211; Bank *v.* Leach, 52 N. Y. 350; Boyd *v.* Nasmith, 17 Ont. 40; Essex County Nat. Bank *v.* Bank of Montreal, 7 Biss. 193; Bank *v.* Whitman, 94 U. S. 343, 345; Bank *v.* Jones (Ill. Sup.), 27 N. E. Rep. 533; Bank *v.* Cornhauser, 37 Ill. App. 475; Bank *v.* Miller, 77 Ala. 168; Larsen *v.* Breene, 12 Colo. 480; 21 Pac. Rep. 498; Bank *v.* Rotge, 28 La. Ann. 933; Morse Banks, §§ 414, 415. We are of opinion that this view of the law rests on sound reasons. If it be true that the existing methods of doing business make the use of certified checks necessary, the persons who receive them can always require them to be certified before delivery. If they receive them uncertified, and then present them to the bank for certification instead of payment, so far as the drawer is concerned, the certification should be considered as payment. It may also be said that in the second case the certification amounted to an extension of the time of payment at the request of the payees without the consent of the drawers. Before the certification the drawers could have requested the payees to present the check for payment on Saturday, or could themselves have drawn out the money and paid the check. After certification the amount of the check no longer stood to the credit of the drawers, and the payees had accepted an obligation of the bank to pay only through the clearing house, which could not happen before the following Monday. The result is that in the first case the judgment is reversed, and the demurrer overruled; and in the second case the judgment is affirmed. So ordered.

Check must be Presented within a Reasonable Time — Now Generally held Necessary to Present or Forward for Presentment within Twenty-four Hours.

Mohawk Bank *v.* Broderick, 10 Wend. 304.

This was an action of assumpsit, tried at the Albany Circuit in March, 1831, before the Hon. James Vanderpoel, one of the Circuit Judges.

The plaintiffs declared as the indorsees of a check drawn by John Le Breton, on the Mechanics' and Farmers' Bank in Albany, for $86.18, bearing date the 14th January, 1830, payable to the order of the defendants, and by them indorsed to the plaintiffs. A special verdict was found, from which the following facts appeared: The check was drawn previous to the 14th January, post dated, and delivered to the defendants, who transferred it, also before the 14th January, to one Myers, and indorsed their names upon it in blank; on the 14th January Myers deposited it in the Mohawk Bank at Schenectady, where it was received and entered to his credit as cash. On the 3d February, the Mohawk Bank sent the check to the Commercial Bank, in Albany, in exchange as cash, which bank caused the check to be presented for payment to the Mechanics' and Farmers' Bank on the 6th February, when payment was refused, the check protested, and notice sent to the defendants. Neither on the 14th January, 1830, nor at any time afterward, had Le Breton, the drawer of the check, any funds in the Farmers' and Mechanics' Bank; previous to that day he had overdrawn his account $90, which was made good on the 4th February. At the date of the check Le Breton was a merchant in Albany, doing business and continuing in business until the 1st of February, when he stopped payment; during all the month of January he was insolvent and continued so until his death; none of his debts except the check in question were due until he stopped payment. The average time in which the Mohawk Bank makes its exchanges with the Albany banks is once in three weeks; from the 14th of January until the 3d February, no packages were sent by the Mohawk Bank to the Albany banks, nor were any exchanges made between those dates by the Mohawk Bank with the Albany banks. When the Mohawk Bank holds notes payable at Albany, they are sent when about to fall due to the Albany banks for collection, although the usual time for making exchanges has not arrived; but between the above dates no notes were sent to Albany by the Mohawk Bank. A daily mail passes between Schenectady and Albany.

Savage, C. J. Upon the facts presented by the special verdict, the plaintiffs contend that no demand was necessary, as the drawer had no funds in the hands of the drawees, and was insolvent; and if a demand was necessary it was made in a reasonable time. The defendants insist that the check having been drawn and negotiated before its date, it was payable on the day of its

date, to wit, the 14th January, and should have been presented when payable, and, at all events, that it was not presented in a reasonable time.

I cannot assent to the proposition of the plaintiffs, that no demand was necessary in this case. When the action is against the drawer, who has drawn where he had no funds, nor any reasonable expectation that his draft would be paid by the drawee, he cannot object the want of seasonable demand and notice, because in such case he cannot possibly sustain damage from the want of presentment of the bill; such, however, is not this case. This suit is brought not against the drawer, but indorsers. The rule on this subject is well laid down by Mr. Justice Sutherland, in Murray *v.* Judah, 6 Cowen, 490: "As a general rule, therefore, a check is not due from the drawer until payment has been demanded from the drawee, and refused by him. As between the holder of a check and an indorser or third person, payment must be demanded within a reasonable time. But as between the holder and maker or drawer, a demand at any time before suit brought is sufficient, unless it appear that the drawee has failed, or the drawer has in some other manner sustained injury by the delay." Between these parties a demand of payment from the drawees was clearly necessary. Nor can I assent to the proposition of the defendant, that the check in question is a bill payable on the 14th January, and that, therefore, it is to be governed by the same rules as bills payable on a particular day. The check was both drawn and negotiated before its date, the effect of which is that it is payable on demand, on or after the day on which it purports to bear date, and nothing more.

The only serious question is whether the check was presented in reasonable time. In the Merchants' Bank *v.* Spicer, 6 Wendell, 445, Mr. Justice Marcy says: "Checks are considered as having the character of inland bills of exchange, and the holder thereof, if he would prove his right to resort to the drawers and indorsers, must use the same diligence in presenting them for payment and in giving notice of default of the drawer that would be required of him as the holder of an inland bill." With regard to inland bills of exchange and promissory notes payable on demand, the only rule as to when payment must be demanded is that it must be done within a reasonable time. What shall be deemed a reasonable time must in some measure depend on the circumstances of each particular case. In this court, whether the presentment is made within a reasonable time, is held to be a question of law, where there is no dispute about facts; in some other courts it is held to be a question for the jury. It is singular that so little is to be found in the books upon the question, What time is reasonable? As to bills and promissory notes, we have in our own court some cases. In Aymar *v.* Beers, 7 Cowen, 711, Mr. Justice Woodworth has reviewed the cases, from which it appears that no precise time has been determined upon as a reasonable time. In that case the bill was drawn in

New York upon a house in Richmond, Virginia, at three days' sight; it was presented in twenty-nine days, and held to be in time, in consequence of peculiar circumstances. In Robinson *v.* Ames, 20 Johns. R. 146, seventy-five days had elapsed, and it was held that there was no laches; in that case the bill had been negotiated. In both these cases the action was against the drawer.

Although it has been often said that checks are like inland bills of exchange, and are to be governed by the same principles, yet I apprehend greater diligence has been required in presenting checks than ever has been required in presenting bills of exchange. In Mechanics' Bank *v.* Spicer, before cited, it was held that it was not indispensable that a check should be presented on the same day it was drawn, where the parties all resided in the same city. Mr. Chitty, in his treatise on bills, has collected many of the cases on this point, p. 345 to 353, Phil. ed. of 1821. When this question has been decided by juries no uniform rule could prevail; in some, three or four or five days were deemed not too long, and in others it was held that the demand should be on the same day. But the more recent rule seems to be that a check given and payable in London in the morning must be presented the next morning, or, at farthest, during the banking hours of the next day; if it be payable at a place different from where it was drawn, it should be sent by the mail of the next day. In the case of Beeching *v.* Gower, 1 Holt, 313, the plaintiffs were bankers at Turnbridge. On the 5th March, 1816, they received from the defendant a note of the Kentish Bank, payable at Maidstone and at London. They sent it to London on the evening of the 5th; on the 6th it was presented, but the house had failed; it was returned to the plaintiffs on the 7th, and notice given to the defendant. The Maidstone Bank paid on the 6th, but stopped payment on the 7th. Maidenstone is fourteen miles from Turnbridge; London is more than twice the distance. In this action the plaintiffs recovered. In another case between the same parties, the defendants paid the plaintiffs a check on the Maidstone Bank on the 5th April. The plaintiffs kept it the 5th and 6th, and sent it to Maidstone on the 7th but the bank did not open that morning. Had it been sent on the 5th or 6th it seems it would have been paid. Gibbs, C. J., nonsuited the plaintiffs, saying: "The plaintiffs cannot recover; they have been guilty of laches. I will not say that it was their duty to have sent the check off by the post of the 5th; but the extreme time up to which they were justified in keeping it, was till the post of the 6th. They did not send it till the 7th. It does not matter when the carrier arrived; they must suffer for their negligence." In Richford *v.* Ridge, 2 Campb. 537, Lord Ellenborough says: "It seems convenient that a check received in the course of one day should be presented the next, and that the holder must present it with due diligence to the bankers on

whom it was drawn, and give notice of its dishonor to those against whom he seeks a remedy. In that case it appeared that the plaintiffs were bankers at Aylesbury. On the 13th June they cashed for the defendant a check drawn by a house in Smithfield upon a house in the city of London. The plaintiffs might have sent the check on the same day, but they did not till the next, the 14th; their agents presented it on the 15th, when it was dishonored, and notice was given on the 16th. The plaintiffs had a verdict. These were nisi prius cases, but the cause of Robson *v.* Bennet, 2 Taunt. 389, was argued and considered by the court. Mansfield, C. J., cites the case of Appleton *v.* Sweetapple, as deciding that a check need not be presented on the day on which it is drawn. In Cornell *v.* Lovett, 1 Hall, 68, Mr. Justice Oakley says the rule appears to be settled that no laches can be imputed to the holder if the check is presented at any time during the day after that on which it was given. The true rule undoubtedly is, that a check, to charge an indorser, must be presented with all the dispatch and diligence which is consistent with the transaction of other commercial concerns.

The plaintiffs received this check on the 14th January. They were in the habit of sending notes at other times than their regular periods of exchanging, according to the time of their falling due; there was nothing in the nature of their business, therefore, which prevented an earlier presentment of the check in question. According to the cases above referred to, the check should have been sent on the 15th; it would then have been presented on the 16th. Had notice of its dishonor been then given, the court cannot say that the defendants might not have secured themselves, as the drawer was doing business for two weeks after that time before he stopped payment. I am of opinion the defendants are entitle to judgment.

Payment of Checks Through Clearing-House — Effect of Contract for Clearance on Obligation to Honor Checks on Insolvent Bank.

O'Brien *v.* Grant, 146 N. Y. 163 (40 N. E. 871).

Appeal from supreme court, general term, First department.

Action by Miles M. O'Brien and another, receivers of the Madison Square Bank, against Hugh J. Grant, receiver of the Saint Nicholas Bank, to recover certain securities. From a judgment of the general term (32 N. Y. Supp. 498) affirming a judgment dismissing the complaint, plaintiff appeals. Affirmed.

This action was brought to recover from the defendant certain securities which had been deposited by the Madison Square Bank with the St. Nicholas Bank, and the proceeds of the securities, which the latter bank had converted into money. The following

facts were found, and are either undisputed or proved: In January, 1891, an arrangement was made between the Madison Square Bank and the St. Nicholas Bank (both of them being State banks) by which the latter bank, which was a member of the New York Clearing-House Association, became the agent to clear, through the clearing house, checks drawn upon the Madison Square Bank. The St. Nicholas Bank submitted in writing a memorandum of the conditions on which it would undertake this business for the Madison Square Bank, as follows: "$50,000 balance to be kept at all times, to be free from interest. An allowance at the rate of 2 per cent per annum shall be allowed on average exceeding this amount. The Madison Square Bank is to keep with this bank $100,000 in approved bills receivable." In a letter dated January 9, 1891, addressed by the Madison Square Bank to the St. Nicholas Bank, the cashier of the Madison Square Bank says: "Referring to conversation of our president with your good selves, we would say that we accept the terms and conditions on which your bank agrees to clear for us as per your memorandum, namely $50,000 balance to be kept with you at all times, free of interest. Interest at 2 per cent per annum to be allowed us on average exceeding that amount. This bank to keep with you $100,000 of approved bills receivable. * * * We inclose copy of a letter addressed by us to the clearing-house committee to conform with the requirements of their circular of December 18th, last." The letter to the clearing-house committee inclosed a copy of a resolution signifying the acquiescence of the Madison Square Bank with the terms of the circular, and authorizing its cashier to send a check for the annual payment of $200 required of banks clearing through members. It was verbally agreed between the parties, at the time of the arrangement referred to in said letter of the 9th of January, that other securities, of equal value, might be substituted from time to time for those first deposited, making up the $100,000 of bills receivable. The Clearing-House Association was and is a voluntary association of banks and banking associations of the city of New York. The object of the association, as stated in its constitution, is "the effecting at one place of the daily exchanges between the several associate banks, and the payment at the same place of balances resulting from such exchanges." The St. Nicholas Bank was a member of the association. The Madison Square Bank was not so. Section 25 of the constitution was as follows: "Whenever exchanges shall have been made at the clearing-house, by previous arrangements between members of the association, through one of their number and banks in the city and vicinity who are not members, the receiving bank at the clearing house shall in no case discontinue the arrangement without giving previous notice, which notice shall not take effect until the exchanges of the morning following the receipt of such notice shall have been completed." This section was in force at and before January 9, 1891, and is still in force, and it was known to

be so by the Madison Square Bank at the time of the making of this arrangement. After the making of this arrangement, and on and after the 13th January, 1891, the St. Nicholas Bank made the clearances at the clearing house for the Madison Square Bank up to and including the 8th day of August, 1893; and the Madison Square Bank deposited and kept good, as to amount and value, its deposit of bills receivable with the St. Nicholas Bank, and up to some time in July, 1893, kept good its money balance of $50,000 in addition thereto. Some time prior to August 8, 1893, the St. Nicholas Bank desired to terminate the arrangement for making clearances for the Madison Square Bank. At that date it held, also, certain collateral securities, taken upon loans made upon notes of the Madison Square Bank, and by agreement they or their proceeds should be applied to any other obligations of that bank. On the 8th day of August, 1893, the St. Nicholas Bank gave the notice required by the twenty-fifth rule, — that it would cease to make clearances for the Madison Square Bank. This was served upon the banks constituting the Clearing House Association on that day. By the terms of section 25 this notice took effect upon the completion of the exchanges at the clearing house on the 9th of August. These clearances were made every day immediately after 10 o'clock, and were completed before 12 o'clock. The St. Nicholas Bank paid on the 9th of August, through the clearing house, checks drawn upon the Madison Square Bank by depositors having amounts to meet the same to their credit as depositors on the books of the Madison Square Bank, $372,000. On the 8th day of August, 1893, the Madison Square Bank, after ineffectual efforts to obtain a loan to relieve its immediate necessities, was visited by the clearing-house committee and its condition examined; also by an officer of the State bank department. After this examination by the committee of the clearing house, their conclusion that the bank was not in a condition to continue business was communicated to the officers and some of the directors of the Madison Square Bank. The Madison Square Bank did not open for business on the following day. It was, in fact, insolvent on the 8th of August, 1893; and the officers of the St. Nicholas Bank knew before the exchanges were made on the 9th of August, that the Madison Square Bank was insolvent, or that its insolvency was imminent, and that it had stopped business. Included in the gross sum of $372,000, the amount of the checks upon the Madison Square Bank cleared by the St. Nicholas Bank on the 9th of August, were two checks drawn by Elliott Danforth, the treasurer of the State of New York, against funds of the State deposited in the said bank, which checks were signed and dated on the 8th day of August, 1893, and were deposited in banks in the city of New York which were members of the Clearing-House Association, before 10 o'clock on the morning of the 9th of August, 1893, and were by such banks sent to the clearing house on said 9th day of August. The clearance of said checks was regular, and according to the usual course of business among the banks

constituting said Clearing-House Association, notwithstanding the fact that they were not deposited for collection with a clearing-house bank until the morning of the 9th day of August, 1893. The St. Nicholas Bank had no knowledge on the 9th day of August, 1893, of any irregularity in regard to the drawing, deposit, or transmission to the clearing house of any of the checks going to make up said gross amount of $372,000. The referee found that the payments of checks on the morning of August 9, 1893, were in the performance of its contract with the Madison Square Bank, and were not made with the intent on the part of either of the banks to give a preference to any creditor of the Madison Square Bank over any other creditor, or in violation of the corporation law of the State, and he held that the plaintiffs were not entitled to recover any part of the money or securities held by the St. Nicholas Bank. From the affirmance of the judgment entered upon his report, at the general term, the plaintiffs have appealed to this court.

Louis Marshall, for appellants. William Allen Butler, for respondent.

Gray, J. (after stating the facts). The St. Nicholas Bank claims the right to apply the securities and moneys theretofore deposited with it by the Madison Square Bank towards the reimbursement of its payment or clearances of the morning of August 9, 1893. With respect to that claim the proposition of the plaintiffs is twofold: They say that rule 25 of the clearing house did not require the St. Nicholas Bank to clear the checks drawn on the Madison Square Bank, presented after it became aware of the insolvency of the latter, and that such insolvency terminated the relation of clearing-house agents, and rendered any payments made unauthorized; or, if the clearing-house rule is susceptible of the interpretation that it required the St. Nicholas Bank to honor checks drawn on the Madison Square Bank after its insolvency became known to it, the contract between the banks, in so far as it contemplated such payment, and the use of the securities of the Madison Square Bank to secure the advances made by the St. Nicholas Bank, was an illegal preference, under the statute. The controversy must turn, in my opinion, upon the nature of the relation which existed between the two banks in question and the clearing house, and upon what was the extent of the obligation entailed upon the St. Nicholas Bank, in engaging to receive and to clear checks drawn upon the Madison Square Bank, when presented at the clearing house. For the plaintiffs it is argued that, as between the Madison Square Bank and the St. Nicholas Bank, the relation, simply, of principal and agent was created, and therefore, upon the insolvency of the former becoming known, on the morning of the day when clearances of the previous day's checks were to be effected, that the latter bank was not entitled to pay checks drawn upon the former bank. But I think to view the relation as such is altogether incorrect, and unwarranted by the facts. In a certain and

limited sense, the St. Nicholas Bank, of course, would act as an agent, in clearing and paying checks drawn upon the Madison Square Bank. That, however, was a mere feature of that larger contractual relation into which the two banks had entered with the Clearing-House Association, and which characterized all their dealings. The agreement of January, 1891, was one to which there were three parties, each of which was moved to enter into it by a legitimate consideration. The Madison Square Bank acquired the very substantial advantages which the members of the Clearing-House Association enjoyed, in the increased convenience, dispatch, and safety of banking transactions. The St. Nicholas Bank acquired the advantage, benefit, and a protection by the deposit of collateral securities to the amount of $100,000, and of the cash, required to be made by the Madison Square Bank. The cash deposit was to be free of interest, and maintained at a da ly balance of $50,-000. The members of the Clearing-House Association, in extending to the Madison Square Bank the right to have its checks cleared and paid through one of its members, were assured that all checks presented would be paid up to, and including, the day following the giving of the notice by the St. Nicholas Bank of the termination of the arrangement between itself and the Madison Square Bank. The learned referee very correctly defines the arrangement between these two banks and the clearing house as constituting a tripartite agreement, upon ample consideration, for the mutual benefit of all the parties who entered into it. That agreement provided for the length of its duration, for the maintenance at all times of the stipulated security to protect the St. Nicholas Bank, and bound that bank to receive and pay the checks drawn upon the Madison Square Bank as it would its own. The St. Nicholas Bank could only agree and arrange to clear for the Madison Square Bank in accordance with conditions imposed by the constitution and rules of the Clearing-House Association; and an essential condition was that the arrangement could not be discontinued, nor should its liability cease, until after the completion of the exchanges of the morning next following the receipt of a notice of discontinuance. There was nothing in such a provision of the constitution of the clearing-house which was objectionable, legally speaking or otherwise. It was perfectly competent for the banks to form themselves into this voluntary association, and to agree that they should be governed by a constitution and by rules. When adopted, they expressed the contract by which such member was bound, and which measured its rights, duties, and liabilities. Belton *v.* Hatch, 109 N. Y. 503; 17 N. E. 225. If not in conflict with rules of law, they must be awarded that effect which is always accorded to the deliberate engagements of parties. The provisions of section 25 of the constitution of the Clearing-House Association were designed as a security and a protection for the members, in the event mentioned. When the Madison

Square Bank made its arrangement with the St. Nicholas Bank, and also made compliance with the terms of the demand of the clearing-house circular, I think it is clear that a definite contractual relation was at once created between the three parties, whose provisions and relative engagements were effectually defined in and controlled by the constitution and rules of the clearing house, in so far as they touched the proposed clearances of checks. The contract which bound the members of this voluntary associations of banks, and regulated their duties, rights, and liabilities, permitted the representation of an outside bank through a member, provided that member assumed a liability which should not cease until the completion of clearances on the morning next after its notice of a discontinuance was given. That liability so exactly provided for is, however, sought to be limited to cases where insolvency has not supervened, as to the non-member bank. If the relation here was strictly that of an agent acting for a principal, the question might be a serious one; but even then much might be said in favor of the liability which the agent had, with the consent of the principal, assumed. That, however, was not the relation. The Madison Square Bank was a contracting party in an agreement to which the other parties were the St. Nicholas Bank and the Clearing-House Association, and it had accepted, and had become bound by, provisions in the latter's constitution and rules. That agreement was entered into at a time when it was perfectly competent to make it, and its duration was fixed by section 25 of the constitution of the clearing house. As the respondent's counsel says, every bank entitled to the payment of checks sent by it through the exchanges of the clearing house, in due course, had a right to rely upon the liability of any other bank clearing for a nonmember, and unless this liability continued definitely, and up to a certain period, the liability of the clearing bank would not be fixed and enforceable. Here the effect of the constitution and rules of the clearing house upon the agreement was as though it had been stated, in so many words, that it should commence upon January 13, 1891, and should be at an end on August 9, 1893, after the clearances of that day had been completed. What was there in the agreement and its incidents which contravened any rule of law or of policy? The plaintiffs say that the effect is to give an illegal preference, under the statute, which, it is meant, would be accomplished by the payment of checks after the insolvency of the nonmember bank is known, and by the use by the clearing bank of the deposited securities in reimbursement thereof. To that I cannot agree. The statute referred to is the State corporation law (chapter 688, Laws 1892), which, in section 48, contains previously existing provisions of the banking law of this State. The provisions of the section forbid the assignment or transfer of any property "when the corporation is insolvent, or its insolvency is imminent, with the intent of giving a preference to any particular creditor over other creditors of

the corporation." This provision has no application to such a case as this, where, at the time when the arrangement was made with the St. Nicholas Bank, the Madison Square Bank was solvent. It would be absurd to speak of the agreement of January, 1891, as having been made in contemplation of future insolvency, or with the intent to give a preference to any creditor of the Madison Square Bank. If there is any presumption respecting the business engagements of going concerns, it is that they will be fulfilled; and when security is exacted, it is a business precaution, to compel exact and prompt performance, rather than a provision in contemplation of insolvency. If it were otherwise, business transactions which have for their subject the accommodation of one corporation by another in the loan of money, or the extension of credit, would be seriously embarrassed, if not checked. The statute recognizes the right of a banking corporation to transfer promissory notes or evidences of debt, received in the transaction of its ordinary business, to purchasers for a valuable consideration; and it may lawfully do so in pledge to secure its creditor, when it is in a condition of solvency. The deposit of securities made by the Madison Square Bank with the St. Nicholas Bank constituted a lawful pledge of its assets to protect the former against any possible loss in undertaking to clear and pay all checks drawn upon the latter, and sent through the clearing house. The invalidity of a transfer or assignment of property by a banking corporation, under the banking law, is where it has been made while in a condition of insolvency, or in contemplation of it, and with the "intent" of giving a preference. The "intent" must exist, and be inferable, to vitiate the transaction. In this connection our recent decision in Bank *v.* Davis, 143 N. Y. 590; 37 N. E. 646, may be referred to, where the question involved was whether the preference given to savings bank deposits by the State banking law was in contravention of the United States national banking law, which avoids transfers or assignments or deposits made with a view to prefer a creditor. It was there said — and the observation is applicable here — that "it is the voluntary act of the national bank, in contemplation of its insolvency, and with the view of then preventing the ratable application of its property, which is avoided by the national law. In the present case, while a going concern, it entered into an engagement with the savings bank, which the State law required and regulated, which vested in the latter superior rights or equities, and which, in the possible event of future insolvency, would give to it a prior claim to payment from the assets. When that event happened, and the receiver was appointed, he took over the property of the insolvent concern, as trustee for its creditors and shareholders, under the same conditions as the bank held it, and subject to the right of this plaintiff to be the first paid in full before other creditors were paid." So I say here the plaintiffs, upon becoming vested, as receivers, with the property of the insolvent Madison Square

Bank, held it subject to all rights lawfully acquired, and to all superior equities, among which was the right of the St. Nicholas Bank, by virtue of an agreement valid in its inception and at all times, to apply the securities in its possession in reimbursement of its payments of checks presented through the clearing house on the morning of August 9, 1893,— payments which it was obliged to make, as well by the rule of commercial honor as by force of the obligations imposed by the constitution and rules of the clearing house. Nor do the cases of Overman *v.* Bank, 30 N. J. Law, 61, and Merchants' Bank *v.* National Bank, 139 Mass. 518; 2 N. E. 89, referred to, touch this question of the obligation of the clearing bank under the constitution and rules of the clearing house, and with reference to which the nonmember had contracted,— a distinction recognized in the Overman case cited.

The plaintiff's counsel suggests a possible illustration of the effect of the construction, which is given to this section of the clearing-house constitution. He says all the creditors of the Madison Square Bank, becoming aware of its insolvency, might have drawn checks upon their deposits, and, if they succeeded in getting them presented by clearing-house banks, the St. Nicholas Bank would have been compelled to pay them, to its possible ruin. The illustration, however, proves nothing. That may be said to have been a risk assumed by the St. Nicholas Bank, but very much of the business of the land, and especially that portion which is done in Wall street, is conducted upon faith; and experience has shown that it has not, in the main, been misplaced. For such a contingency as counsel suggests, it was necessary that the officers of the Madison Square Bank should have been parties to an immoral and illegal scheme. The St. Nicholas Bank must be deemed to have contemplated and to have assumed every risk, in undertaking to become responsible for the Madison Square Bank, and to have exercised such reasonable judgment in doing so, and to have taken such security against loss therein, as the practical observation and the business experience of its officers suggested.

The conclusion I have reached is that the insolvency of the Madison Square Bank did not excuse the St. Nicholas Bank from the performance of its obligations towards the clearing-house banks. What rather emphasizes the interest in the question of the right of the St. Nicholas Bank to clear and pay on August 9, 1893, all the checks drawn upon the Madison Square Bank and presented by clearing-house banks, is the fact that there were four checks, exceeding in the aggregate the sum of $300,000, which were drawn under somewhat peculiar circumstances. I may refer to two of them, aggregrating $250,000, which were drawn by Mr. Danforth, then State treasurer, on August 8, 1893, who had heard enough, in some way, to take alarm at the situation of the Madison Square Bank, with which were State funds on deposit. He arranged to deposit them with the Manhattan Trust Company, which kept

accounts with the Chase and the Continental National Banks, and which had its checks cleared through them. The two checks were handed into the two banks at a little before 10 o'clock of the morning of August 9, 1893, and were at once sent, with all other checks, to the clearing house, where the business of clearances commences to be transacted at 10 o'clock. The evidence conclusively shows that there was nothing unusual in this transaction. It is the general and invariable custom of the banks in New York City to pass all checks dated upon the previous day, and received between 10 o'clock of that day and 10 o'clock in the morning of the day following, by hand or by mail, through the clearing house, with the clearances of that morning. Checks may come in the morning by mail, or may be brought in by local depositors, before 10 o'clock; and it is considered to be regular, and in the exercise of business prudence, to have them cleared as promptly as the rules allow. In this case there is nothing to show that the officers of the Madison Square Bank knew of the manner in which the State treasurer's checks were deposited for payment by the Manhattan Trust Company, or that they had anything to do with their drawing. It appears that that company acted in good faith in the matter, and Mr. Waterbury, its president, testified that there was nothing unusual, or contrary to the usual course of business, in getting Mr. Danforth's checks put promptly through the clearing house that morning; and it is difficult to see how it would be material, if it was otherwise. As to the two banks which acted for the trust company, they appear to have merely performed their duty to their depositor, in passing the checks severally through the clearing house. Nor can it be pretended that the St. Nicholas Bank had any knowledge or notice respecting these checks, or any of the checks, which it paid in its clearances of August 9th. Its officers had no knowledge of the insolvency of the Madison Square Bank until that morning. Its notices of the day previous, to the various banks, that it would no longer continue to clear for the Madison Square Bank, were based on a dissatisfaction with its failure to keep good its promised daily cash balance of deposits. Until the clearing-house committee completed its examination of the condition of the latter bank, in the afternoon of the 8th of August, it was not known how it stood. The time was one of great excitement and of distrust in financial circles, which cast its shadow over many banks; and a bank to justify being assisted by the associated bank, must show itself to possess sufficient resources, in the possession of assets of real value. The attention of the clearing-house committee being called to the Madison Square Bank, their examination resulted in the advice that it should suspend. They did not decide as to the solvency of the bank. It might resume, if it succeeded in making such arrangements as would put it in the possession of funds by realization upon its assets. However that might be, the bank decided not to open its doors on the following morning. It was

affirmatively testified to by the cashier of the St. Nicholas Bank that they had no suspicion of the inability of the Madison Square Bank to continue its business, when sending out notices to other banks, but thought it unsafe to continue clearing for it, in view of its past conduct. If the evidence showed any knowledge in the St. Nicholas Bank as to the particular checks, as to which so much has been urged, and which it paid in the clearances of the morning of August 9th, or if it had such notice concerning the designs of their drawers as to make it an abettor in an unlawful scheme to obtain a preference over other creditors, a very different question would be presented. But there was nothing whatever to charge it with any knowledge or notice, and all the evidence goes to prove that it acted in perfect good faith; and that being so, and its payment of checks passing through the clearing house on the morning of August 9th having been made in discharge of the liability resting upon it, under the constitution and rules of the association, it not only could not, but it should not, be made to suffer a loss. The knowledge possessed by it, in common with the public, in the morning of August 9th, did not change its position or affect its liability. The presumption was that every check presented at the morning's clearances was held for value, and it was for the plaintiffs to rebut that presumption, and to show that the banks presenting checks were not acting in good faith in what they did, but merely as agents for the drawers, in obtaining the funds drawn against. They failed to do so. More than that, the evidence established the contrary, except in the possible instances of the two checks drawn by the Uhlmans, which were two of the four checks I mentioned as taking the clearances of August 9, 1893, out of the ordinary. I deem it unnecessary to discuss the facts respecting them. The St. Nicholas Bank was in no respect more informed about their making or their collection than it was about the other checks. If there was anything irregular concerning them, I agree with the learned referee that the question would affect, not the St. Nicholas Bank, but the right of the bank which presented them to hold their proceeds. If we leave out of consideration the two Uhlman checks, the balance of account is still against the plaintiffs and their action would have to fail any way. For these reasons, as for those which were well expressed by the very learned referee, and with which they are in harmony, I think the judgment below was right, and I advise its affirmance here. All concur, except Andrews, C. J., and Peckham, J., dissenting. Judgment affirmed.

Liability of Collecting Bank for Worthless Check Received by it in Payment of Note — When Check Operates as Assignment pro tanto of Fund on Deposit.

Bank of Antigo *v.* Union Trust Co., 149 Ill. 343 (36 N. E. 1029).

Appeal from appellate court first district.

Assumpsit by the Bank of Antigo against the Union Trust

Company upon a check drawn on the defendant by A. Weed & Co. Defendant obtained judgment, which was affirmed by the appellate court. Plaintiff appeals. Affirmed.

On and prior to September 2, 1890, A. Weed & Co. were doing business at Ashland, Wis., and that day delivered their check for $3,000, drawn upon appellee bank, to appellant, and took up a note owned by appellee, then due, against Hoxie & Mellor, theretofore sent to appellant by appellee for collection, and on which A. Weed & Co. were indorsers. The check was as follows: "Chicago, September 2d, 1890. The Union Trust Company: Pay to the order of Amos Baum, cashier, three thousand dollars. A. Weed & Co." The said Baum, cashier of appellant bank, accepted the check as so much cash, canceled the note, delivered it to A. Weed & Co., and remitted the amount, less $3 charges, to appellee by draft on appellant's correspondent, the Merchants' Bank of Chicago, which draft was duly paid, etc. The check was also sent to the Merchants' Bank of Chicago by appellant for collection, and presented to appellee for payment on September 4, 1890, and dishonored; whereupon due protest was made, etc. On August 25, 1890, upon certain representations made by A. Weed & Co., appellee was to, and did on September 3d following, discount for them $11,249.65 of Hoxie & Mellor paper, the same being three notes of $3,000, $3.000, and $5,430, respectively. On September 2d, A. Weed & Co. had to their credit on the books of appellee $809.25, and on that day and the following, prior to crediting their account with the proceeds of the discounted paper, had overdrawn their account to the amount of $5,760.57; so that, after deducting overdrafts, a balance was left to their credit on appellee's books, at the close of business on September 3d, of $5,489 08. On the evening of this day, appellee became aware of the failure of Hoxie & Mellor, and at the opening of business on the morning of September 4th, charged back to A. Weed & Co. the $5,430 note, less discount ($85.65), and returned it to them with the following letter: "Chicago, September 4, 1890. Messrs. A. Weed & Co., Ashland, Wis.—Dear Sirs: Upon being informed yesterday that Messrs. Hoxie & Mellor had failed, we deducted the amount of the note of $5,430, less discount, $85.69, — $5,344.31, — from your account, and herewith return the note. Yours, respectfully, G. M. Wilson, Cashier," — thus leaving a balance to the credit of A. Weed & Co. of $144.77 at the time of the presentation of the check for payment on that day. An action was brought by appellant against appellee on the check in the circuit court of Cook county, and resulted in verdict and judgment for appellee. On appeal to the appellate court, this judgment was affirmed, and plaintiff below prosecutes this further appeal.

Shope, J. (after stating the facts). It is contended that the contract between appellee and Weed & Co. under which the three notes of Mellor & Hoxie were discounted was an entire

contract, and that appellee had no right to rescind as to the $5,430 note, and retain the proceeds of the two $3,000 notes. It is true, as stated by counsel for appellee, that the general rule is that, when a party wishes to rescind an entire contract, he must rescind it in toto or not at all. Harzfeld *v.* Converse, 105 Ill. 534. But it is not to be overlooked that this is a rule of construction, based upon the intention of the parties to the contract, and not a rule of law controlling that intention. 2 Pars. Cont. 521. Conceding that the discounting of the notes in question constituted a contract between appellee and Weed & Co., it does not appear from the record, nor is it claimed, that Weed & Co., have treated or sought to treat the contract as entire and indivisible. On the other hand, it does appear that the $5,430 note was returned to them by appellee, with a letter informing them that, having heard of the failure of Hoxie & Mellor, the makers of the notes, the amount thereof had been deducted from their account, etc. Weed & Co. on September 6, 1890, sent this note back to appellee, who, on the 8th, again returned it to Weed & Co., who, it seems, retained it. The letter of Weed & Co. of the 6th, or their purpose in returning the note, is not shown. Nor does it appear that they then or afterwards asserted or undertook to assert under the contract any right against appellee. In the absence of any proof to the contrary, it may, we think, be said that Weed & Co. by their silence have themselves elected to treat the contract as rescinded as to the $5,430 note. If A. Weed & Co. have acquiesced in the rescission of the contract as to the $5 430 note by appellee, it cannot be in the logic of things that appellant can succeed to any greater rights under the contract than A. Weed & Co., who, as we have seen, in the absence of countervailing proof on that question, have elected to acquiesce in the rescission. Appellant being under no constraint, in order to protect its own interests or rights, to pay the debt of A. Weed & Co. to appellee, but having, as will be seen, paid the same voluntarily, could not be subrogated to the rights of A. Weed & Co. in the premises. Hough *v.* Insurance Co., 57 Ill. 318; Young *v.* Morgan, 89 Ill. 199; Beaver *v.* Slanker, 94 Ill. 175.

But were the foregoing considerations not warranted by this record, we think, under the facts in this case, that the discounting of the notes constituted an apportionable contract. The record shows that in its letter of September 1, 1890 (in reply to one from A. Weed & Co. containing the proposition for discounting $15,000 of Hoxie-Mellor paper), appellee said that it could "use, say, $10,000 of the paper" referred to "from September 1st to 4th," and that, under this arrangement, the three separate notes above mentioned were discounted by appellee. It is not contended that appellee had not the right, had the integrity of the notes at the time been questionable, to have refused to discount any or all of them. Each note constituted, in and of itself, a separate and independent contract, upon a distinct con-

sideration, and the books of the bank show that they were discounted as separate and distinct entries. The rule as laid down by Mr. Parsons (volume 2, star p. 517) is: "If the part to be performed by one party consists of several distinct and separate items, and the price to be paid by the other is apportioned to each item to be performed, or is left to be implied by law, such a contract will generally be held to be severable." And Mr. Wharton (Cont., § 748) says: "When a consideration is divisible, and the price can be apportioned, then, if a distinct divisible portion of the consideration fails, the price paid for such portion can be recovered back;" and that, "in cases * * * in which the consideration is divisible, the purchaser may elect to take what can be delivered to him, and in such case, if the purchase money has been paid, he can recover back the excess, or, if there has been no payment, defend pro tanto." See cases in notes. In Manufacturing Co. *v.* Wakefield, 121 Mass. 91, where the action was an account for certain India-rubber goods sold, and the price of each article, and discount from the gross sum, were stated in the account, the court, in passing upon the question of whether the contract was entire or divisible, said: "We do not deem this contract to have been an entire one. That a contract should be of that character, it is not sufficient merely that the subjects of purchase are included in the same instrument of conveyance. If but one consideration is paid for all the articles, so that it is not possible to determine the amount of consideration paid for each, the contract is entire. Miner *v.* Bradley, 22 Pick. 457. * * * When many different articles are bought at the same time for distinct prices, even if they are articles of the same general description, so that a warranty that they are all of a particular quality would apply to each, the contract is not entire, but is in effect a separate contract for each article sold. Johnson *v.* Johnson, 3 Bos. & P. 162; Miner *v.* Bradley, supra." To the same effect is the doctrine stated in Wooten *v.* Walters, 110 N. C. 251; 14 S. E. 734, 736, where the sale was of a stock of merchandise and land. It was there said that, "though a number of things be bought together without fixing an entire price for the whole, but the price of each article is to be ascertained by a rate or measure as to the several articles, or when the things are of different kinds, though a total price is named, but a certain price is affixed to each thing, the contract in such cases may be treated as a separate contract for each article, although they all be included in one instrument of conveyance or by one contract;" citing Johnson *v.* Johnson and Miner *v.* Bradley, supra. See, also, Hill *v.* Reave, 11 Metc. (Mass.) 268; Cushing *v.* Rice, 46 Me. 302; Preston *v.* Spaulding, 120 Ill. 208; 10 N. E. 903. We are, however, referred by counsel for appellant to the case of Harzfeld *v.* Converse, supra, as maintaining a contrary view. This is a misapprehension. That case falls clearly within the rule, announced in the Massachusetts and other cases, that where "the purchase

is of goods as a particular lot, * * * or the number of barrels in which the goods are packed, the contract is held to be entire." Manufacturing *v.* Wakefield, supra, and cases therein collated. Moreover, at the time of the discounting of said notes, Weed & Co. had overdrawn their account with appellee $5,760.57. By the judgments of the circuit and appellate courts, the controverted question of fact as to fraud on the part of Weed & Co. in the transaction is conclusively settled, and that such fraud was consummated before the payment of Weed & Co.'s overdrafts. This being so, appellee would be excused from surrendering up to Weed & Co. the two $3,000 notes. Preston *v.* Spaulding, supra, and cases cited. We are therefore of opinion that appellee had the right to rescind the contract, as it did, by returning to Weed & Co. the $5,430 note, and charging the same back to their account.

It is also insisted that, although appellee had the right to partially rescind the contract as against Weed & Co. it could not legally exercise such right as against appellant, it being a bona fide holder of the $3,000 check in question, drawn by Weed & Co. on appellee. It appears that about September 2, 1890, appellee sent to appellant for collection and returns a $3,000 note, then due, against Hoxie & Mellor, owned by appellee, and upon which Weed & Co. were indorsers. On that day Weed & Co. gave appellant the check in question, drawn on appellee for the amount of the note, which was at once canceled by appellant and surrendered to Weed & Co. Appellant received the check as cash, and remitted the proceeds, less charges, to appellee, by draft on Merchants' Bank of Chicago. This remittance was received by appellee on September 3d, and paid. On the next day, about noon, the check sued on was presented to appellee for payment, which was refused. Appellee, in the meantime, between the receipt of the remittance and presentation of the check for payment, having become apprised of the business failure of Hoxie & Mellor and the fraud of Weed & Co., had charged back to Weed & Co.'s account, and returned to them, the said $5,430 note, less discount ($85.65), leaving a balance to the credit of Weed & Co. of $144.77, only, when the check was presented. It is not shown or pretended that appellant, in making collection of said note, was authorized by appellee to receive in payment thereof anything but money. When appellant received the note from appellee for collection, it then and thereby became the agent of appellee for that purpose; and the law is well settled that unless such agent is specially authorized so to do, he has no right to accept in payment of his principal's debt anything in lieu of money. Matthews *v.* Hamilton, 23 Ill. 470; Ward *v.* Smith, 7 Wall. 447; Howard *v.* Chapman, 4 Car. & P. 508; Story Prom. Notes (7th Ed.), §§ 115-389, and notes. Being authorized to receive money only, the agent has no implied power to receive a check in payment (Hall *v.* Storrs, 7 Wis. 253); and where the collection agent, not being there-

unto authorized, accepts in payment of his principal's demand a check, or depreciated currency, and loss ensues thereby, he must bear it (Ward *v.* Smith, *supra;* Morse Banks, 431, 432; Harlan *v.* Ely, 68 Cal. 522; 9 Pac. 947).

But it is claimed that the drawing of the check by Weed & Co. on appellee operated as an assignment to appellant of so much of the fund on deposit, against which it was drawn, as was necessary to pay it. As between the drawer and drawee, this is doubtless correct. Union Nat. Bank *v.* Oceana Co. Bank, 80 Ill. 212. But, in order to charge the bank with the amount, it is indispensable that the check be first presented to it for payment, or some other act done equivalent thereto. This rule was announced in the early case of Munn *v.* Burch, 25 Ill. 35, where it was held that the check of a depositor on his banker, delivered to another for value, transfers to the payee therein, and his assigns, so much of the deposit as the check calls for, and that, when presented to the bank for payment, the banker becomes liable to the holder for the amount thereof provided the drawer has at the time sufficient funds on deposit to pay it. And this doctrine has been subsequently reaffirmed in numerous decided cases in this court, among which see Insurance Co. *v.* Stanford, 28 Ill. 168; Bickford *v.* Bank, 42 Ill. 238; Fourth Nat. Bank *v.* City Nat. Bank, 68 Ill. 398; Bank *v.* Jones, 137 Ill. 634; 27 N. E. 533. That appellee had, between the time of making the check and its presentation for payment, on deposit to the credit of Weed & Co., funds sufficient to meet the check, can have no bearing on the question. Appellee had no notice of the existence of the check until presented for payment, and the deposit against which it was drawn having been, as we have seen, depleted by proper charges and deductions until only a meager sum remained, there was no sufficient fund left on deposit out of which it could be paid, and the check was therefore rightfully dishonored. Other errors are assigned, which have been carefully considered, but, in view of what has been said, no useful purpose would be served by a discussion of them. The judgment of the appellate court will be affirmed. Affirmed.

CHAPTER XVII.

PAYMENT OF AND BY BILLS, NOTES AND CHECKS.

SECTION 178. Payment distinguished from sale or transfer.
179. Payment by whom.
180. Payment to whom.
181. Conditions of Payment — Legal tender — Surrender of paper — Receipt.
182. Payment by bill or note — Presumption as to its absolute or conditional character.
183. Payment by check.

§ 178. **Payment distinguished from sale or transfer.** — Payment consists of the performance of a contract, with the intention of extinguishing the liability of the party paying or of the party for whom the payment has been made. The same outward acts may and do often constitute a sale, when the parties intend to transfer, instead of extinguishing, the liability on the contract. In each case the real intention determines the character of the transaction; and it must be determined, in the absence of an express understanding or agreement, by circumstances which are sufficient in strength to overcome the general presumption of law, that payment of money on a contract is intended as a technical payment, and a consequent extinguishment of the contract or liability on such contract.[1] In applying this question to payment of bills, notes and checks, the most important circumstance, in determining the character of the transaction, is the relation of the party paying to the bill or other commercial paper.

§ 179. **Payment by whom.**— It is a well-settled rule of the law of contracts, that, while only a party to a contract can make tender of payment, so as to affect the claims of

[1] Lancey *v.* Clark, 64 N. Y. 206 (21 Am. Rep. 604); Dougherty *v.* Deeney, 45 Iowa, 443; Swope *v.* Leffingwell, 72 Mo. 348; Greening *v.* Patten, 51 Wis. 146 (18 N. W. 107); Moran *v.* Abbey, 58 Cal. 163.

the holder in any respect whatever; actual payment, made with the intention of extinguishing the contract, when accepted by the holder, can be made by any one, whether he be a party to the contract or not. And this is equally true of bills, notes and checks.

If a stranger makes payment of a bill, note or check, payable to bearer, without any agreement as to his intention in making such payments, it will probably be presumed that he intended to acquire title to such bill or note, and not to extinguish the liabilities of the parties to the paper. But if the paper is payable to order and is transferred to him without indorsement, the presumption is that it is a payment and not a sale or transfer, even though the paper has not been canceled or payment acknowledged thereon.[1] This presumption may, however, be rebutted by proof of intention, and it is a question for the jury to determine in the light of all the circumstances of the case.[2]

Any party to the paper has the right to make or tender payment. If the party paying is the primary obligor,— the maker of a note or acceptor of a bill,— the payment will extinguish the bill or note completely, and all the parties to it are discharged. And this is true, not only when the party paying is the ostensible and actual primary obligor,[3] but also where he is an ostensible secondary obligor, for whose accommodation the bill or note has been

[1] Binford *v.* Adams, 104 Ind. 41; Gilliam *v.* Davis, 7 Wash. 332 (35 P. 69); Eastman *v.* Plumer, 32 N. H. 238; Bailey *v.* Malvin, 53 Iowa, 371 (5 N. W. 515). But see Kennedy *v.* Chapin, 67 Md. 454 (10 A. 243); Dodge *v.* Freedman's &c. Trust Co., 93 U. S. 379; Swope *v.* Leffingwell, 72 Mo. 348.

[2] Deacon *v.* Stodhart, 2 Man. & G. 317; Wilcoxen *v.* Logan, 91 N. C. 449; Dougherty *v.* Deeney, 45 Iowa, 443; Hall *v.* Kimball, 77 Ill. 161; Voltz *v.* Nat. Bank, 158 Ill. 532 (42 N. E. 69) (payment of checks by clearing-house agent); Swope *v.* Leffingwell, 72 Mo. 341; Campbell *v.* Allen, 38 Mo. App. 27.

[3] Gardner *v.* Maynard, 7 Allen, 456 (83 Am. Dec. 699); Slade *v.* Mutrie, 156 Mass. 19 (30 N. E. 168) (part payment); Eastman *v.* Plumer, 32 N. H. 238; Stevens *v.* Hannan, 88 Mich. 13 (49 N. W. 874 (payment by one of two joint makers); Boyd *v.* Bell, 69 Tex. 735 (7 S. W. 657). But see Sater *v.* Hunt, 66 Mo. App. 527.

negotiated. For example, if A. for the accommodation of B. makes a note payable to the order of the latter, who negotiates it and at maturity pays the note, payment by B. will operate as a complete extinguishment of all liability on such note, and a subsequent transfer of it to an innocent purchaser will give him no cause of action against A.[1] So, also, if payment has been made of such a note by the maker, A., it will constitute a complete extinguishment of the paper, so as to prevent its reissue or further negotiation; but A. would, of course, have his cause of action against B. for reimbursement, and the canceled note may be put in evidence in proof of his claim.[2]

Where, however, payment is made by a secondary obligor, by an indorser or the drawer of a bill, in a case where the paper has not been negotiated for his accommodation, payment by him simply extinguishes his own liability and the liability of subsequent indorsees, and leaves intact the causes of action against the primary obligor and all prior secondary obligors, whose liabilities have been preserved by the proper presentment, protest and notice at the time of maturity. And an indorser, or drawer, so paying, by canceling all subsequent indorsements, has the right by his own fresh indorsement to reissue the paper, the new transferee acquiring the right to proceed on the paper against all the prior parties thereto.[3]

[1] Gardner *v.* Maynard, 7 Allen, 457 (83 Am Dec. 699); Guild *v.* Gayer, 17 Mass. 615; Jones *v.* Broadhurst, 9 C. B. 173; Mead *v.* Small, 2 Me. 207 (11 Am. Dec. 62). In the case of a bill payable at sight, payment may be made *supra protest* by any stranger for the honor of one or more of the parties to the bill. The same requirements as to declarations for whose honor he pays are made as in the case of acceptance *supra protest.* Denston *v.* Henderson, 13 Johns. 322; Smith *v.* Sawyer, 55 Me. 139 (92 Am. Dec. 576); Pirez *v.* Bank of Key West, 36 Fla. 467 (18 So. 590).

[2] Griffith *v.* Reed, 21 Wend. 502 (34 Am. Dec. 267); First Nat. Bk. *v.* Maxwell, 83 Me. 576 (22 A. 479); Ryan *v.* Doyle, 29 Ky. 363; Bell *v.* Norwood, 7 La. 95; International Bank *v.* Bowen, 80 Ill. 541; Woods *v.* Woods, 127 Mass. 141; Stark *v.* Alford, 49 Tex. 260; Board of Education *v.* Sinton, 41 Ohio St. 504.

[3] French *v.* Jarvis, 29 Conn. 347; West Boston Sav. Inst. *v.* Thompson, 124 Mass. 506; St. John *v.* Roberts, 31 N. Y. 441 (88 Am. Dec. 287);

If an indorser allows his property to be sold in satisfaction of a judgment procured against him on his indorsement, of a note, it has been held that he cannot recover of the maker, the value of the property so sold, but only the amount actually credited on the execution, after paying the costs of the sale; since it was his duty to protect his own property by the payment of the note.[1]

§ 180. **Payment to whom.**— For the purpose of extinguishing the liabilities of the parties to the paper, payment must be made to the holder, or to his duly authorized agent. If the paper is payable to bearer or indorsed in blank, payment may be made to any one having possession of the bill or note, however defective his title to it may be, if the payor does not know of such defect.[2] But if the paper is payable to order, payment to any one but the person, to whose order it is payable, or his authorized agent, will not discharge the liabilities of the parties, unless the payee was in fact entitled to receive payment, either in his own right or as the representative of the holder.[3] Where there has been no indorsement, the party having actual title to the bill or note may prove his title by extraneous evidence; as

Tredway *v.* Antisdel, 86 Mich. 82 (48 N. W. 956); Willis *v.* Willis, 42 W. Va. 522 (26 S. E. 515); Fenn *v.* Dugdale, 40 Mo. 63; Stanley *v.* McElrath, 86 Cal. 449 (25 P. 16). But see Wallace *v.* Grizzard, 114 N. C. 488 (19 S. E. 760), where payment by guarantors was held to be absolute, extinguishing all liabilities on and rights under the notes, because the makers had been charged up in their accounts with the guarantors, with the amounts paid on the notes. And see Timberlake *v.* Thayer, 71 Miss. 279 (14 So. 446).

[1] March *v.* Barnet, 114 Cal. 375 (46 P. 152).

[2] Dugan *v.* United States, 3 Wheat. 172; Bank of U. S. *v.* United States, 2 How. 711; Lamb *v.* Matthews, 41 Vt. 42; Bachellor *v.* Priest, 12 Pick. 399; Cone *v.* Brown, 15 Rich. 262; Bank of Utica *v.* Smith, 18 Johns. 230; Mauran *v.* Lamb, 7 Cow. 174; Grieve *v.* Schweitzer, 36 Wis. 554. But payment to an unauthorized person knowingly does not extinguish liability. Chappelear *v.* Martin, 45 Ohio St. 126 (12 N. E. 448).

[3] Sims *v.* U. S. Trust Co., 103 N. Y. 472 (9 N. E. 605); Doubleday *v.* Kress, 50 N. Y. 410; Quinn *v.* Dresbach, 75 Cal. 159 (16 P. 762); Paris *v.* Moe, 60 Ga. 90; Pease *v.* Warren, 29 Mich. 9 (18 Am. Rep. 58); Porter *v.* Cushman, 19 Ill. 572; Stiger *v.* Bent, 111 Ill. 328; Exchange Nat. Bank *v.* Johnson, 30 Fed. 588; Burke *v.* White, 61 Mo. App. 521.

for example, in the case of a general assignee, assignee in bankruptcy, personal representative of a deceased holder, trustee or guardian of an insane person or infant.[1]

§ 181. **Conditions of payment — Legal tender — Surrender of paper — Receipt.**—No one, without the consent of the holder, can make payment of an ordinary bill or note, except by the tender of money, *i. e.*, legal tender. If the bill or note calls for the payment of a given amount of dollars and cents in general terms, the payor can make payment in any kind of money, which by the law of the land is declared to be legal tender. At the present time, the legal tender constitutes the gold and silver coin of the denomination of one dollar and over, and the United States treasury notes.[2] The fact, that there is any difference in the values of the various kinds of legal tender in the markets of the world, does not affect the right of the payor to select the kind of legal tender, in which to make payment, as long as the bill or note does not call for payment in any particular kind. He tenders the amount of money, called for by the bill or note, whether the kind he selects be depreciated or appreciated in value.[3] But if the bill or note calls for payment in any particular kind of legal tender; for example, in gold, it can only be satisfied by a tender of that kind, and the holder may refuse to receive any other.[4]

If the paper calls for payment in anything else than

[1] Leonard *v.* Leonard, 14 Pick. 280; Sampson *v.* Fox, 109 Ala. 662 (19 So. 896). See Perry *v.* Perry (Ky.), 32 S. W. 755; Nunnemacker *v.* Johnson, 38 Minn. 390 (38 N. W. 351); Lennon *v.* Brainard, 36 Minn. 330 (31 N. W. 172) (assignee under defective indorsement).

[2] Hepburn *v.* Griswold, 8 Wall. 604; Legal Tender Cases, 12 Wall. 457; Juillard *v.* Greenman, 110 U. S. 421.

[3] Bush *v.* Baldrey, 11 Allen, 367; Atwood *v.* Cornwall, 28 Mich. 336 (15 Am. Rep. 219); Killough *v.* Alford, 32 Tex. 457 (5 Am. Rep. 249); Gilman *v.* County of Douglass, 6 Nev. 27 (3 Am. Rep. 237).

[4] Bronson *v.* Rodes, 7 Wall. 245; Trebilcock *v.* Wilson, 12 Wall. 687; McGoon *v.* Shirk, 64 Ill. 408 (5 Am. Rep. 122); Phillips *v.* Dugan, 21 Ohio St. 466 (8 Am. Rep. 66); Poett *v.* Stearns, 31 Cal. 78; Tooke *v.* Bonds, 29 Tex. 419; Bridges *v.* Reynolds, 40 Tex. 204.

legal tender, as in "bank-bills," tender of such currency will be sufficient.[1]

With the consent of the holder, payment may in any case be made in something other than legal tender. But an agent has no such implied authority. In the absence of express authority, he cannot receive anything but money in payment.[2] Before making payment, the payor has the right to demand an opportunity to examine the bill or note, for the purpose of assuring himself of the genuineness of the signatures and of the body of the paper, as well as of the title of the holder to the paper.[3]

Another condition, which the payor can and should exact in making payment, is that the bill or note paid should be surrendered to him, for the purpose of preventing any further claim against him on the paper, and as evidence of the fact that payment has been made in full.[4] It is doubtful whether a receipt can be demanded. The better authority is, that it cannot, however valuable it may be as strong evidence of payment.[5]

[1] Davis *v.* Phillips, 7 Mon. 632; Dillard *v.* Evans, 4 Ark. 175.

[2] DeMets *v.* Dagson, 53 N. Y. 635; Tuscaloosa Cotton-seed Oil Co. *v.* Perry, 85 Ala. 158 (4 So. 635); Moye *v.* Cogdell, 69 N. C. 93; Buttrick *v.* Roy, 72 Wis. 164 (39 N. W. 345); Speurs *v.* Ledergerber, 56 Mo. 465; Nunnemacker *v.* Johnson, 38 Minn. 390 (38 N. W. 351); Herriman *v.* Shomon, 24 Kan. 387 (36 Am. Rep. 261).

[3] Wheeler *v.* Guild, 20 Pick. 545 (32 Am. Dec. 231); Canal Bank *v.* Bk. of Albany, 1 Hill, 287; Goddard *v.* Merchants' Bk., 2 Sandf. 247; aff'd 4 N. Y. 147; Adams *v.* Reeves, 68 N. C. 134 (12 Am. Rep. 627); Wilcox *v.* Aultman, 64 Ga. 544 (37 Am. Rep. 92).

[4] Dugan *v.* United States, 3 Wheat. 172; Otisfield *v.* Mayberry, 63 Me. 197; Freeman *v.* Boynton, 7 Mass. 483; Baring *v.* Clark, 19 Pick. 220; Bank of University *v.* Tuck, 96 Ga. 456 (23 S. E. 467); Stone *v.* Clough, 41 N. H. 290; Bond *v.* Starrs, 13 Conn. 412; Norris *v.* Badger, 6 Cow. 449; Storey *v.* Krewson, 55 Ind. 397 (23 Am. Rep. 668); Fitzmaurice *v* Mosier, 116 Ind. 363 (16 N. E. 175) (equity will compel surrender of a fully paid note); Brinkley *v.* Going, 1 Ill. 366; Buehler *v.* McCormick, 169 Ill. 269 (48 N. E. 287); Best *v.* Crall, 23 Kan. 432 (33 Am. Rep. 185). See Johnston *v.* Allen, 22 Fla. 224.

[5] See Jones *v.* Fort, 9 B. & C. 764; Thayer *v.* Brackett, 12 Mass. 450. But part payment may be required to be noted on the bill or note. See Emerson *v.* Cutts, 12 Mass. 78; Ward *v.* Howard, 88 N. Y. 74.

§ 182. **Payment by bill or note — Presumption as to its absolute or conditional character.** — When a payment is made of a debt by a bill or note, the intention of the parties — whether such payment shall be absolute, and shall therefore extinguish all liability on the original debt, whether the bill or note is ultimately paid or not, or only conditional upon its being honored at maturity, — may of course be definitely expressed at the time of the transaction; and such express intention cannot be controlled by any collateral circumstances. But where the parties have given no expression to their intention in the premises, it is left to legal presumption to determine whether the payment in such a case is absolute or conditional. As to what is the presumption of law, the cases are hopelessly conflicting, the general tendency being to hold to the presumption, that the payment is conditional. There are conflicting decisions on almost all of the possible cases, which may arise.

Thus, it has been held, where the payment is made by the debtor's own note of a precedent or contemporary debt, it is a conditional payment.[1] On the other hand it has been held that such a payment by bill or note is presumptively absolute.[2] Where a precedent debt is paid by the bill or note of a third person, whether it is payable to order and indorsed, or payable to bearer and unindorsed,

[1] Peter *v.* Beverly, 10 Pet. 532; Bank of United States *v.* Daniel, 12 Pet. 32; Winsted Bank *v.* Webb, 39 N. Y. 325 (100 Am. Dec. 435); Bd. of Education *v.* Fonda, 77 N. Y. 350; Nightingale *v.* Chafee, 11 R. I. 609 (23 Am. Rep. 531); Middlesex *v.* Thomas, 5 C. E. Gr. (20 N. J. Eq.) 39; Morris *v.* Harveys, 75 Va. 726; Archibald *v.* Argall, 53 Ill. 307; Scott *v.* Gilkey, 153 Ill. 168 (39 N. E. 265); Farwell *v.* Salpaugh, 32 Iowa 582; Sutliffe *v.* Atwood, 15 Ohio St. 186; Geib *v.* Reynolds, 35 Minn. 331 (28 N. W. 923); Wiles *v.* Robinson, 80 Mo. 47; Welch *v.* Allington, 23 Cal. 322; Breitung *v.* Lindauer, 37 Mich. 217. As to contemporary debt, see Sheehy *v.* Mandeville, 6 Cranch, 258.

[2] Ward *v.* Bourne, 56 Me. 61; Dodge *v.* Emerson, 131 Mass. 467; Green *v.* Russell, 132 Mass. 536; Smith *v.* Bettger, 68 Ind. 254 (34 Am. Rep. 256); Franklin Life Ins. Co. *v.* Wallace, 93 Ind. 7; Morrison *v.* Smith, 81 Ill. 221; Hoodless *v.* Reid, 112 Ill. 105; Mehlberg *v.* Fischer, 24 Wis. 607; Tisdale *v.* Maxwell, 58 Ala. 40; Rowe *v.* Collier, 25 Tex. 252.

the payment is generally held to be conditional [1] with a few cases, holding such payments to be presumptively absolute.[2] But there seems to be a general agreement in the case of the payment of a contemporaneous debt by a stranger's bill or note, that it is presumed to be *absolute*, where the bill or note is payable to bearer or indorsed in blank by some prior holder, so that it may be transferred without indorsement;[3] and *conditional*, where the paper is payable to order, and can be transferred only by indorsement.[4] It is also generally held to be only a conditional payment, where in the renewal of a note, the old note is retained by the holder.[5] But where the old note has been surrendered, this would seem to be undoubtedly a case of absolute payment, and so it has been held.[6]

[1] Downey *v.* Hicks, 14 How. 240; Freeman *v.* Benedict, 37 Conn. 559; Conkling *v.* King, 10 N. Y. 440; Potts *v.* Mayer, 74 N. Y. 594; Gibson *v.* Tobey, 46 N. Y. 637 (7 Am. Rep. 397); Wilhelms *v.* Schmidt, 84 Ill. 183; Gordon *v.* Price, 10 Ired. L. 385; Tilford *v.* Miller, 84 Ind. 185; Cook *v.* Beech, 10 Humph. 413. But see Shaw *v.* Republic L. Ins. Co., 69 N. Y. 286.

[2] Dennis *v.* Williams, 40 Ala. 633; Ely *v.* James, 123 Mass. 36; Draper *v.* Sexton, 118 Mass. 427. See Bay City Bank *v.* Lindsay, 94 Mich. 176 (54 N. W. 42).

[3] Tobey *v.* Barber, 5 Johns. 68 (4 Am. Dec. 326); Gibson *v.* Tobey, 46 N. Y. 637 (7 Am. Rep. 397); Day *v.* Kinney, 131 Mass. 37; Gordon *v.* Price, 10 Ired. L. 385; Susquehanna Fert. Co. *v.* White, 66 Md. 444 (7 A. 802). But see Huse *v.* McDaniel, 33 Iowa, 406 (4 Am. Rep. 244); Huse *v.* Flint, *ib.*; Huse *v.* Hamblin, *ib.*

[4] Monroe *v.* Haff, 5 Den. 360; Soffe *v.* Gallagher, 3 E. D. Smith, 507; Shrimer *v.* Keller, 25 Pa. St. 61. See Day *v.* Thompson, 64 Ala. 269.

[5] Woods *v.* Woods, 127 Mass. 141; Heath *v.* Achey, 96 Ga. 438 (23 S. E. 396); Hobson *v.* Davidson, 8 Mart. (La.) 422 (13 Am. Dec. 294); Jansen *v.* Grimshaw, 125 Ill. 468 (17 N. E. 850) Adams *v.* Squires, 61 Ill. App. 513; Boston Nat. Bank *v.* Jose, 10 Wash. 185 (38 P. 1026).

[6] Phoenix Ins. Co. *v.* Church, 81 N. Y. 218 (37 Am. Rep. 494); McMorran *v.* Murphy, 68 Mich. 246 (36 N. W. 60); Childs *v.* Pellett, 102 Mich. 558 (61 N. W. 54); Morris *v.* Harvey, 75 Va. 726; Second Nat. Bank *v.* Wetzel, 151 Pa. St. 142 (24 A. 1087); Nichols *v.* Bate, 10 Yerg. 429; Compton *v.* Patterson, 28 S. C. 115 (5 S. E. 270); Bk of Com. *v.* Letcher, 3 J. J. Marsh. 195; Smith *v* Harper, 5 Cal. 329. But see Parrott *v.* Colby, 71 N. Y. 597; First Nat. Bank *v.* Kuevals, 67 Hun, 648; Jagger Iron Co. *v.* Walker, 76 N. Y. 521, and see McElwee *v.* Metropolitan Lumber Co., 69 Fed. 302; 16 C. C. A. 232.

These presumptions may always be rebutted, not only by proof of an express agreement to the contrary; but, likewise, by influence from collateral circumstances, which seem to indicate an intention contrary to the legal presumption.[1]

Wherever the payment by bill or note is held to be conditional, the right of action on the original debt is suspended, until the bill or note is payable; and if it should be dishonored at maturity, the right of action on the original debt revives, and the creditor has his right of election on which liability to bring suit. But if he elects to sue on the original debt, he must produce in court, or satisfactorily account for the absence of the bill or note, so that the debtor may be protected from a subsequent suit on the bill or note by a *bona fide* holder of the same.[2]

§ 183. **Payment by check.**— Where the payment of a debt is made by a check,— apparently, whether it be the check of the debtor or of some third party,— it is presumed always to be a conditional payment only, and becomes an absolute payment only when the check has been paid. And so strong is this presumption, that, where the debt takes the form of a bill, note or other instrument of indebtedness, the holder is not obliged to surrender such instrument, until the check has been paid.[3]

[1] Appleton *v.* Parker, 15 Gray, 173; Amos *v.* Bennett, 125 Mass. 123; Shumway *v.* Reid, 34 Me. 560 (56 Am. Dec. 679); Tobey *v.* Barber, 5 Johns. 68 (4 Am. Dec. 326); Meyer *v.* Lathrop, 73 N. Y. 315; Weston *v.* Wiley, 78 Ind. 54; Courtney *v.* Hogan, 93 Ill. 101; Jansen *v.* Grimshaw, 125 Ill. 468 (17 N. E. 850); Burchard *v.* Frazer, 23 Mich. 224; Charlotte Steamboat *v.* Hammond, 9 Mo. 58 (43 Am. Dec. 536).

[2] Tobey *v.* Barber, 5 Johns. 68 (4 Am. Dec. 326); Cole *v.* Sachett, 1 Hill, 516; Harris *v.* Johnston, 3 Cranch, 311; Matthews *v.* Dare, 20 Md. 248; Alcock *v.* Hopkins, 6 Cush. 484; Beecher *v.* Dacry, 45 Mich. 92; Miller *v.* Lumsden, 16 Ill. 161; Holmes *v.* Lykins, 50 Mo. 399.

[3] Small *v.* Franklin Min. Co., 99 Mass. 277; Smith *v.* Miller, 43 N. Y. 171 (3 Am. Rep. 690); 52 N. Y. 545; Davison *v.* City Bank, 57 N. Y. 81; Canadian Bank *v.* McCrea, 106 Ill. 281; Woodburn *v.* Woodburn, 115 Ill. 427 (5 N. E. 82); Barnet *v.* Smith, 30 N. H. 256 (64 Am. Dec. 290); Henry *v.* Conley, 48 Ark. 267 (3 S. W. 181); Phillips *v.* Bullard, 58 Ga. 256;

And if an agent for collection were, without authority, to receive a check in payment of a bill or note, and surrender the bill or note before payment of the check; any loss, resulting from the dishonor of the check, and his surrender of the bill or note, would fall upon the agent.[1] But payment by check is so far an absolute payment, that, where it is given in payment of a bill, the drawer of the check cannot countermand it, on learning of the insolvency of the drawer of the bill.[2]

ILLUSTRATIVE CASES.

Bay City Bank *v.* Lindsay, 94 Mich. 176 (54 N. W. 42).
Voltz *v.* National Bank of Illinois, 158 Ill. 532 (42 N. E. 69).
Sampson *v.* Fox, 109 Ala. 662 (19 So. 896).

Payment of Bill by Acceptor's Sight Draft on Drawer which the Latter agreed Orally to Pay — Absolute Payment — No Recourse against Drawer by the Bank which Paid the Original Bill to Holder, on Receipt of the Sight Draft, and which Draft was Subsequently Dishonored.

Bay City Bank *v.* Lindsay, 94 Mich. 176 (54 N. W. 42).

Error to circuit court, Wayne county; George S. Hosmer, Judge.

Action by the Bay City Bank against Archibald G. Lindsay, survivor, etc., to recover the amount of a draft. From a judgment for defendant, plaintiff appeals. Affirmed.

MONTGOMERY, J. The plaintiff declared on the common counts,

Turner *v.* New Farmers' Bk. (Ky. '97), 39 S. W. 425; Watkins *v.* Parsons, 13 Kan. 426; Jones *v.* Heiliger, 36 Wis. 149. If bill or note is surrendered, payment by check becomes absolute. First Nat. Bk. *v.* Maxwell, 83 Me. 576 (22 A. 479). See Equitable Nat. Bank *v.* Griffin & Skelley Co., 113 Cal. 692 (45 P. 985).

[1] Whitney *v.* Essen, 99 Mass. 308 (96 Am. Dec. 762); Smith *v.* Miller, 43 N. Y. 171 (3 Am. Rep. 690); 52 N. Y. 546; Rathbun *v.* Citizens' Steamboat Co., 76 N. Y. 376; First Nat. Bank *v.* Fourth Nat. Bk., 89 N. Y. 412; Weyerhausen *v.* Dun, 100 N. Y. 150; 2 N. E. 274 (taking a note in payment). Certification of the check before delivery to him would not change his liability in case of the dishonor of the check. Bickford *v.* First Nat. Bank, 42 Ill. 238 (89 Am. Dec. 436); Brown *v.* Leckie, 43 Ill. 497. See Deutsche Bank *v.* Berirs, 73 Law. T. 669.

[2] Equitable Nat. Bank *v.* Griffin Skelley Co., 113 Cal. 692 (45 P. 985).

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and furnished a bill of particulars which limited its demand to a claim for $2,000 paid E. J. Vance & Co. on December 15, 1890, for the firm of Lindsay & Gamble, and at their request to take up the draft hereinafter referred to. The other item in the bill is the liability of defendant on the draft, a copy of which was served with the declaration. The draft in question was dated September 12, 1890, was drawn by the defendant on E. J. Vance & Co., payable to the order of the drawers, and was accepted by E. J. Vance & Co., payable at the Bay City Bank. It was indorsed as follows: "Pay E. W. Leech & Co. or order. Lindsay & Gamble, E. W. Leech & Co., (in blank,)"—and also: "Pay to the order of W. O. Cliff, cashier, for collection, for account of Peninsular Savings Bank, Detroit, Mich. J. B. Moore, Cashier." The case rested upon the testimony adduced by the plaintiff, which tended to show that the defendant's firm, at the date of the transactions in question, consisted of A. G. Lindsay and Patrick M. Gamble, since deceased; that Gamble was a member of all three firms,—of Lindsay & Gamble, E. J. Vance & Co., and Leech & Co.; that on the day of maturity of the draft, it was presented for payment at the Bay City Bank; that payment was refused for the reason that there were no funds of E. J. Vance & Co. in hand to pay with; that during the day the attention of the bookkeeper of E. J. Vance & Co., Mr. Butts, was directed to the subject by the cashier of the plaintiff. For a statement of what followed, we quote from the testimony given by Mr. Butts on the trial: "I went to the bank, and told Mr. Young, the cashier of the Bay City Bank, that it was paper that Lindsay & Gamble should pay, and that I would have to make a draft back on them to pay it with. Mr. Young said he would take a demand draft or a sight draft, if I would call up Lindsay & Gamble, and have Mr. Lindsay say that he would take care of it. I then went to our office, and called up Mr. Lindsay, and reminded him of this paper coming due, that they should pay. I asked him if he would take care of a demand draft, if I should make it, and he said, 'On demand is a pretty short time;' he hardly thought he would be able to take care of it. He asked me if I could not make it for a few days' time. I think he mentioned ten days. I told him I hardly thought the bank would want to use a paper of that time, but, if I could make it at sight, that would give him three days' time to pay it. 'Well,' he says, 'do the best you can.' I then went to the bank, and told the cashier that Lindsay & Gamble would take care of a sight draft. The bank officer said, 'All right;' that they would take it in payment of this paper. Question: That paid the paper? Answer: Yes, sir." The circuit judge directed a verdict for defendant, and plaintiff brings error.

It is first insisted that the draft should not be treated as paid, but should be held good in the hands of the bank; and it is claimed that the case falls within that class in which it is held

that payment by an indorser or other party to commercial paper, who, as between himself and the other parties to such paper, stands in the position of surety, does not necessarily render the paper functus officio, but that it may be again put afloat by the indorser. Daniel Neg. Inst. 1230, and cases cited. We think, however, the testimony in this case does not show an attempt on the part of Vance & Co. to so treat this paper. This draft, when presented, had a limited indorsement, and the undoubted intention on the part of Vance & Co. was to pay and retire it, and the bank, in terms, accepted a sight draft, and agreed to make payment, and did in fact make payment. There was no intention on part of either Vance & Co. or the officers of the bank that title should vest in the plaintiff. This is made to further conclusively appear by the fact that the bank charged the amount of the draft in question to the account of Vance & Co. and credited the proceeds of the sight draft, and afterwards fixed the liability of Vance & Co. by protesting the sight draft. It is unnecessary, therefore, to decide whether Vance & Co. had the right to reissue the draft after payment by them, as no attempt to do so is shown. The circuit judge was right in holding that the draft was paid, and that no recovery could be had thereon.

2. The question of defendant's liability, under the money count, for money paid for his use, is more difficult of determination. The plaintiff's contention is that the transaction amounted to a payment by the bank of $2,000 upon a demand upon which the defendant was liable previously, and which it was the defendant's duty to pay, and which the bank did in fact pay at his request; and it is said that the fact that the defendant agreed to accept a draft for the amount, and that such agreement is void under How. St., § 1583, does not change the relations of the parties; that the right of action was complete when the money was advanced. There is much force in this contention. Indeed, it seems to us unanswerable, if it can be held that the transaction in question established any privity between the defendant and the bank. But a careful examination of the testimony discloses the fact that the defendant did not authorize Butts to speak for him. There is nothing in Butts' testimony which discloses that he was directed to ask any other than Vance and Co. to make payment of this draft. The testimony further shows that the plaintiff in fact accepted the sight draft of Vance & Co. on defendant, and credited this to the account of Vance & Co., and charged the time draft to him. Vance & Co. were liable to the bank, and the defendant was liable to Vance & Co. There is, therefore, this additional difficulty standing in the way of plaintiff's recovery here: Not only was the agreement to accept oral, but it was made to Vance & Co., and no authority to bind defendant was given, except an oral promise to accept the sight draft. It follows that there was no such privity of contract between the plaintiff and defendant as entitles the plaintiff to recover. Judgment is affirmed, with costs. The other justices concurred.

Payment of Checks Through Clearing House Agent — Conditional — and Gives Agent Rights of Indorser.

Voltz *v.* National Bank of Illinois, 158 Ill. 532 (42 N. E. 69).

Appeal from appellate court, First district.

Assumpsit by the National Bank of Illinois against Fred L. Voltz and Albert Lang, copartners as Fred L. Voltz & Co. Plaintiff obtained judgment, which was affirmed by the appellate court. 57 Ill. App. 360. Defendants appeal. Affirmed.

This cause is brought to this court by appeal on a certificate of importance from the appellate court of the First district. On and for some time prior to June 3, 1893, there was in the city of Chicago an association known as the Chicago Clearing House. The membership of that association comprised certain of the Chicago banks, and its purpose was to facilitate the daily settlement between those banks. The National Bank of Illinois, appellee, and the First National Bank of Chicago, were both members of that association. On and for some time prior to June 2, 1893, Hermann Schaffner & Co. were engaged in business as private bankers in the city of Chicago. They were not in the clearing-house association, but through an arrangement between them and appellee checks drawn upon the former were cleared by the latter. In order to make this arrangement effective, so that checks drawn upon Hermann Schaffner & Co., and certified, would be received by the clearing-house banks, it became necessary for appellee to guaranty the payment of such checks. On June 2, 1893, the First National Bank held for collection a draft for $581.03, drawn on appellants, F. L. Voltz & Co., and by them accepted. On that day appellants, who then had funds on general deposit with Hermann Schaffner & Co., drew a check upon the latter for the sum of $581.03, had it certified, and delivered it to the First National Bank in payment of the draft. That check was received by the First National Bank between 11 and 12 o'clock on June 2d, and too late to be put through the clearing house on that day. At about 8:30 a. m. of June 3, 1893, Hermann Schaffner & Co. made a voluntary assignment for the benefit of their creditors. They then ceased doing business, and are still insolvent. On June 3, 1893, the First National Bank presented said check through the clearing house to the National Bank of Illinois. The payment of it was refused on account of the insolvency of Hermann Schaffner & Co. The cashier of the First National thereupon called the attention of appellee to the guaranty in evidence, and thereupon appellee issued its cashier's check for the amount, and the check in suit was indorsed "Without recourse," by the First National Bank, and delivered to appellee. The amount of the check was charged by appellee as an overdraft of Herman Schaffner & Co.'s account, and it subsequently filed a claim for the amount so paid

against the estate of Hermann Schaffner & Co. The following is a copy of the check as it was offered in evidence:—

"No. 1,076. Chicago, June 2d, 1893. To Hermann Schaffner & Co., Bankers: Pay to the order of the First National 581\frac{03}{100}$ (five hundred eighty-one and $\frac{03}{100}$ dollars). F. L. Voltz & Co."

"Certified June 2nd, 1893. Hermann Schaffner & Co. A. Swartz, Teller."

Indorsed on back: "First National Bank. Without recourse. R. J. Street, Cash."

"Pay through Chicago Clearing House only.

"Paid June 3rd, 1893."

The indorsement, "Paid June 3rd, 1893," is the clearing-house stamp, put there on June 2d, and dated a day ahead by the First National Bank in anticipation of payment through the clearing of the next day, as was the usage among the members of the clearing house.

The following is a copy of the guaranty given by appellee to the First National Bank:—

"Chicago, Feb. 3rd, 1886. L. J. Gage, Esq., Vice-President, City — Dear Sir: This bank hereby holds itself accountable for payment on presentation in the regular course to it of any and all checks or drafts drawn apon the banks and bankers below named, or either of them, and properly certified by them. This obligation, however, to apply only to such drafts and checks as may be received by you in the course of your business in payment of collections or discounted items. * * *

"Hermann Schaffner & Co.

"Truly yours,

"Wm. A. Hammond, Cashier."

The suit is assumpsit by appellee, as assignee of the check, against appellants, as makers. The declaration also contains the common counts. The issues joined were submitted to the circuit court without a jury, and the finding and the judgment were for appellee for $607.66 damages. And thereafter the judgment was affirmed in the appellate court.

At the trial, appellants submitted certain written propositions, to be held as law. The court held proposition 1, as follows: "(1) The court finds as a matter of law that the relationship between Hermann Schaffner & Co. and the plaintiff herein, whereby the latter represented the former in the clearing house in the city of Chicago, was that of principal and agent." But the court refused to hold propositions from 2 to 9, inclusive, which were as follows: "(2) The court finds as a matter of law that the plaintiff herein came into possession of the check sued on herein for and as the agent of Hermann Schaffner & Co., and that the payment made therefor by it to the First National Bank was in law a payment by Hermann Schaffner & Co., and an extinguishment of the drawer's liability. (3) The court finds as a matter of law that, as the National Bank of Illinois was not liable upon its guaranty to the First National Bank, the payment by it was made

as volunteer, and it is not entitled to be subrogated as against the defendants to the rights of the First National Bank. (4) The court finds as a matter of law that the contract executed by the National Bank of Illinois in 1886 was ultra vires and void, and that the First National Bank could not have maintained any recovery thereon for the check in question. (5) The court finds as a matter of law that the contract of guaranty executed by the National Bank of Illinois to the First National Bank in 1886 is void, as rendering the National Bank of Illinois liable for an amount in excess of the capital stock of the company actually paid in, and that the First National Bank could not have maintained any action thereon for the recovery of the amount of the check in suit. (6) The court finds as a matter of law that the contract of guaranty executed by the National Bank of Illinois to the First National Bank in 1886 is void, as being against public policy; and that the First National Bank could not have maintained any action thereon for the recovery of the amount of the check in suit. (7) The court finds as a matter of law that the defendants are not liable to the plaintiff upon the check sued on herein. (8) The court finds as a matter of law that the First National Bank was bound to know the ultra vires character of the contract of guaranty executed to it by the National Bank of Illinois in 1886 by reason of itself being a national bank. (9) The court finds as a matter of law that Hermann Schaffner & Co. would have no right of action upon the check in question if it had paid it, and that the National Bank of Illinois cannot, by virtue of the payments made by it in the course of its agency for Hermann Schaffner & Co., acquire any greater rights as against the defendants herein than Hermann Schaffner & Co. would have had had such payment been made by them."

Baker, J. (after stating the facts). There was no real inconsistency in the rulings of the trial court upon the written propositions submitted to it in holding proposition 1, and refusing to hold propositions 2, 7, and 9 as law in the decision of the case. Assuming it to be true that, while appellee represented Hermann Schaffner & Co. in the clearing house, the relation that existed between them was that of principal and agent, yet that relation ceased to exist early on the morning of June 3, 1893, when Hermann Schaffner & Co. made a general assignment for the benefit of their creditors, and ceased doing business, and appellee refused longer to represent them in the clearing house, and threw out and returned their clearings, amounting to $6,976.01. The evidence is that in the forenoon of June 3d appellee refused longer to pay checks certified by them and that the check in question was not paid through the clearing house. The testimony of Mr. Moll, who was assistant cashier of appellee, is explicit that the check was paid by appellee on account of the guaranty in writing held by the First National Bank. And Mr. Street, cashier of the First National Bank, testifies in chief: "This check was shown to me by our note teller, and I remembered the fact that we had

a guaranty from the National Bank of Illinois, and I held them to their guaranty simply, and they took the check up." And testifies on cross-examination: "When that check was not paid through the clearing house, our bank, either on June 3d, or June 5th, demanded that the National Bank of Illinois should give us the face of it." And also says that he indorsed the check by way of transfer to the National Bank of Illinois, but to protect his own bank, made the indorsement "without recourse." In holding proposition 1 the trial court did not, either in terms or by necessary implication, find as matter of fact that appellee, in paying the check, did so as agent of Hermann Schaffner & Co.; and when that proposition is read in the light of the refusal to hold propositions 2, 7, and 9, it is manifest that court must have found that appellee did not pay or come into possession of the check "for and as the agent" of Hermann Schaffner & Co. Therefore the doctrine that payment by the agent of the maker of a note or drawee and acceptor of a check is a payment of the note or check, and an extinguishment of the liability of the indorser of such note or drawer of such check, has no application to the case; and the authorities cited by appellants upon this branch of the controversy — i. e. Mechem Ag., § 487; Burton *v.* Slaughter, 26 Grat. 914; and Johnson *v.* Glover, 121 Ill. 283; 12 N. E. 257 — are not in point. In our opinion, the conclusion here must be that, when appellee gave to the First National Bank the cashier's check for the face of the F. L. Voltz & Co. check, and took an assignment of the latter check, it did so, not as the agent of Hermann Schaffner & Co., but as guarantor of said check. And it follows, since appellee did not pay the check as agent, that by the indorsement it took the legal title to the check, and has a legal right, as assignee, to recover the money therein specified from appellants, the drawers of the check, the said Hermann Schaffner & Co. having failed and refused to make payment; and this wholly regardless of the considerations that may have induced it to make the payment and take the assignment. Appellants, the drawers, procured the certification of the check prior to its delivery to the payee, and they are primarily liable to such payee or its assignee. Bank *v.* Jones, 137 Ill. 634, 27 N. E. 533; Brown *v.* Leckis, 43 Ill. 497; Bickford *v.* Bank, 42 Ill. 238; Rounds *v.* Smith, Id. 245.

It is claimed in some of the refused propositions that were submitted to the court, and also in the argument of appellants, that the contract of guaranty given by appellee to the First National Bank was ultra vires and void; that it was also void as rendering appellee liable for an amount in excess of its capital stock actually paid in, and void as being against public policy; and that, therefore, the First National Bank could not have maintained any action thereon against appellee for the recovery of the amount of the check in suit, and, consequently, the payment made by appellee was made as a volunteer, and it is not entitled to be subrogated, as against appellants, to the rights of the First

National Bank. Even if all these claims should be conceded, yet, if we were right in the conclusions we have announced above, appellee, as assignee of the check, has a complete legal right of recovery, and it is wholly immaterial even if he has not the equitable right to be subrogated to the position of the First National Bank.

But the determination of the question whether the guaranty contract is ultra vires and void, or void as being otherwise contrary to the statute under which appellee was organized, or against public policy, depends upon the interpretation that is to be placed upon the national bank act, and the effect to be given its provisions. It may be that, if a statute of this State was involved, then the rule that no right of action can spring out of an illegal contract, held in Penn *v.* Bornman, 102 Ill. 523, and in other cases, would apply. But in the very case just cited the paramount authority of the Supreme Court of the United States to construe all Federal statutes, including the national bank act, is fully conceded. The doctrine of the Federal courts, as applied to this case, is that, even if the guaranty which appellee gave to the First National Bank was ultra vires, as given in violation of the national bank act, yet appellee could not urge that defense after the First National Bank, in reliance upon that guaranty, had taken the certified check in payment of the acceptance of F. L. Voltz & Co.; and that the power to redress the wrong committed by the appellee bank was in the government only, by a proceeding to forfeit the charter of the bank. Bank *v.* Matthews, 98 U. S. 621; Bank *v.* Whitney, 103 U. S. 99; Weber *v.* Bank, 12 C. C. A. 93; 64 Fed. 208. It would seem that under the decisions of the Federal courts appellee could not have availed itself of the defense of ultra vires in an action brought on the guaranty. But, even if it could have done so, it did not, but paid the check in accordance with its guaranty; and the question of the validity of such guaranty was one in which appellants had no interest, and it is a matter of indifference to them whether they pay the First National Bank or appellee; and therefore they cannot be heard to say that appellee shall not have the benefit of the doctrine of subrogation. Slack *v.* Kirk, 67 Pa. St. 380; 2 Morse Banks, § 723. Here the guaranty was not indorsed on the check, but was written on a separate paper, and that paper was addressed only to the First National Bank; and upon the face of the guaranty there was an express restriction that the obligation assumed should "apply only to such drafts and checks as may be received by you in the course of your business in payment of collections or discounted items." And the rule is that a guaranty so given and addressed to a particular person or corporation only is not negotiable, and is a mere personal contract. 2 Daniel Neg. Inst., § 1774. And it results from this rule that appellants, the drawers of the check, are total strangers to this contract of guaranty, and it does not inure to their benefit, or invest them with any right.

Appellee, being legally liable, or, at the very least, under moral obligations for the payment of the certified check to the First National Bank, it cannot be said that it was a mere volunteer when it paid the money and took up the check. A person who, though not obliged to do an act, yet has an interest in doing it, is not to be regarded as necessarily and simply a volunteer. Wright *v.* Railway Co., 1 Q. B. Div. 252; Holmes *v.* Railway Co., L. R. 4 Exch. 254; L. R. 6 Exch. 123. And where one guaranties payment of a note or check, and on default of payment by the principal debtor pays the same to the holder, the law will imply a promise to repay on the part of the persons primarily liable, and the guarantor will be subrogated to the rights of the holder to whom he makes payment, and may maintain assumpsit against such persons. Babcock *v.* Blanchard, 86 Ill. 165; Hamilton *v.* Johnston, 82 Ill. 39; Sheld. Subr. (2d Ed.), p. 285, § 186.

We think there was no substantial error in the rulings of the circuit court upon the written propositions that were submitted to it. The judgment of affirmance rendered by the appellate court is affirmed. Affirmed.

What Constitutes Payment — Presumption of Payment in Assumption of Debts of an Old Corporation by a New Corporation.

Sampson *v.* Fox, 109 Ala. 662 (19 So. 896).

Bakewell, C. J. The action is founded on two promissory notes, made by appellee, payable to the order of Hinton E. Carr, at the Tuscumbia Banking Company, Tuscumbia, Ala.—the one of date September 5, 1892, for the payment of $100, 30 days after date; the other of like tenor, of date November 28, 1892, for the payment of $306, sixty days after date. The first note contains a clause in these words, after the words "value received:" "Having deposited or pledged as collateral for the payment of this note pledging as collateral security for same, my account against Tuscumbia Electric Light & Water Company, showing a balance due of $409.22. And I hereby give to the holder full power and authority to sell or collect, at my expense, all or any portion thereof, at any place, either in the city of Tuscumbia or elsewhere, at public or private sale, at his option, on nonperformance of above promise, and at any time thereafter, and without advertising the same, or otherwise, giving five days notice, in case of public sale. The holder may purchase without being liable to account for more than the net proceeds of sale." The second note contains a clause in all respects similar, except that the collateral is described as "all of my claim against the old Electric Light & Water Company." The defendant pleaded the general issue, nil debet, and four special pleas. The first special plea was payment to Carr, at maturity of notes, and be-

fore they were transferred to plaintiff. The second was of payment by the transfer of the collateral to Carr on the maturity of the notes. The third and fourth purport to be pleas of set off, and in substance allege the transfer and pledge of the collateral, the negligence of Carr and of the banking company in its collection, whereby the same was lost to the defendant. The issues were, by the consent of the parties, tried by the court without the intervention of a jury. The plaintiff read the notes in evidence, and proved that they belonged to and were assets of the Tuscumbia Banking Company, a partnership composed of Hinton E. Carr and Emma Carr, which failed on the 8th day of June, 1893, and on the 10th of June, 1893, made to the plaintiff a general assignment of all its assets. The plaintiff produced the collateral in court and offered to surrender it. The collateral were accounts due from the Electric Light & Water Company, a corporation; and plaintiff proved that on the 20th of September, 1892, the said corporation sold and transferred all of its property to a new company, called the Tuscumbia Water Company, and thereafter the former company ceased to exist. The defendant was examined by deposition in his own behalf, and testified that, when the first note was made, Carr, who was president of the Tuscumbia Ice Factory, and also of the Tuscumbia Banking Company, said to him that there would be a consolidation of the Tuscumbia Light & Water Company, and the Tuscumbia Ice Factory. At that time he got from Ross, the treasurer of the Electric Light & Water Company, a statement of the amount due him from the company, carried it to Carr, and on it as collateral Carr loaned him $100. In the following November he borrowed from Carr $300; "or, in other words, he gave me $300, and I assigned him over my claim for $400, or maybe a little over $400, on the Tuscumbia Water Company, Consolidated, and Mr. Carr told me to assign him my claim, and in 30 days he would have the bonds of the Consolidated company sold, and have the money, and he would then cancel my notes, and send them to me. He took my claim in payment of my two notes to the bank." Further he testified: "I made the transfer of my claim against the Tuscumbia Light & Water Company to the banking company (H. E. Carr), at the time and date, simultaneously with the date of my last note of $300 to the bank and delivery to me of the money, at which time he agreed to take the claim and pay my two notes." Further, he testified: "Then after, or about two or three months afterwards, I had a conversation with Mr. H. E. Carr, at the bank. I asked him if he had ever sold the bonds; that I did not want the interest on the two notes to be accumulating against me. He then said to me, 'You need not give yourself any uneasiness,' as my claim that I had transferred to him was quite sufficient, and he would and had taken that in payment of my two notes to the bank." Further, he testified: "H. E. Carr was president of the Tuscumbia Banking Company. He was president, superintendent, and general manager of the Tuscumbia Water Com-

pany; and he said they (the two companies) would be consolidated in a few days. He said he owned two-thirds of the Tuscumbia Water Company, and he wanted enough claims and stock to continue him in the control of the consolidated company; and in the consolidation or agreement of consolidation, he had agreed to pay my claim, and the claim of Thompson & Houston Company, of Atlanta, Ga. He had given his individual notes for the Thompson & Houston Company and (if not mistaken) my claim." He further testified that neither the bank nor its officers had returned or offered to return his claim against the Tuscumbia Light & Water Company; that it could have been collected by the use of due diligence; that the company, at the time the notes fell due, was solvent. R. L. Ross, a witness for defendant, testified that the Tuscumbia Water Company was formed as a corporation the 18th or 20th September, 1892. The Electric Light & Water Company owed the defendant about $400, and owned the electric light plant and arc lights, and had a franchise for a water company. It sold all of its property to the Tuscumbia Water Company, and had no property of any kind left. Carr was not a stockholder in the Electric Light & Water Company, nor was the Tuscumbia Banking Company. He was the principal stockholder in the Tuscumbia Water Company, and made an offer to buy all the property of the Electric Light & Water Company, and the property was sold, about the 18th or 20th of September, 1892; the water company assuming to pay the debts (including the debt due the defendant) of the Electric Light & Water Company, the company then owing about $3,500. The property of the water company cannot be sold for more than $4,000. Charles Womble, a witness for defendant, testified that he was secretary, treasurer, and general manager of the Tuscumbia Water Company, of which Carr is the president and principal stockholder; that the water company has not paid, as it assumed to pay, any of the debts of the electric light company; that it owes, in addition, $1,500 or $1,600, "and its bonds, to the amount of $7,000, are out and in the hands of Armstrong, cashier of a bank at Memphis, and there is a mortgage on its property to the amount of $25,000." Carr, as a witness for the plaintiff, testified that he had not, nor had the Tuscumbia Banking Company, ever collected any part of the collateral mentioned in the notes; that he made no agreement with respect to the collateral, except that started in the notes; that he had never said to the defendant to assign him the collateral, and in 30 days he would have the bonds of the consolidated company sold, and have the money, and he would then cancel the notes, and send them to the defendant; that he did not take the collateral in payment of the notes; that it was taken as collateral security, and has not been paid; that, except as shown in the notes, there was no transfer of the collateral to him, or to the banking company; that he made no agreement with the defendant to take the collateral and pay the notes for the banking company; that he did not have, with the defendant,

any of the conversations to which he testifies; that the collateral had not been taken, or agreed to be taken, in payment of the notes. The plaintiff, as a witness, testified that, since the collateral came to his hands, no part thereof had been collected; that the Electric Light & Water Company, within his knowledge, had not had any property since the sale in 1892 to the water company. This was all the evidence. The bill of exceptions recites, as the findings and judgment of the court, that "the court held and decided that, as Hinton E. Carr, one of the partners in the Tuscumbia Banking Company, was president of the Tuscumbia Water Company, and its principal stockholder, which company had assumed to pay all the debts of the Electric Light & Water Company, the law presumed that the debt due from the Electric Light & Water Company had been paid. * * * The court further ruled that the presumed payment of the collateral paid the notes sued on, and that plaintiff could not recover." Thereupon the court rendered judgment for the defendant, from which the appeal is taken.

We cannot assent to the theory upon which the court below based the judgment. The promise or obligation of the Tuscumbia Water Company to pay the debts of the Electric Light & Water Company, as matter of fact or of law, raised no presumption of their payment. It created a duty, and, primarily, a duty owing only to the Electric Light & Water Company, to make payment of the debts, performance of which that company alone could enforce. The debts remained, as they were contracted, the liabilities of the party contracting them. The creditors to whom they were owing had the election to accept or reject the water company as the debtor, as a party may accept or reject any promise made by a third party to another for his benefit. But, without acceptance, the creditors could not enforce the promise; and, if they elected not to accept, the promise or obligation was due only to the Electric Light & Water Company, and that company alone had the right to compel performance of it. Whether there was acceptance or rejection, the debts were not paid. If there was acceptance, there was only a change of debtors, not payment of the debts. The creditors accepting simply became entitled to enforce for their own benefit, the promise or obligation which had been made to their debtor. Henry *v.* Murphy, 54 Ala. 246. The principle on which the court seems to have proceeded is that, when the dual obligation to pay, and the duty and authority to demand and receive payment of a debt, co-exist in the same person, the law presumes, and conclusively presumes, the debt to be paid. But there must be concurrence and co-existence of the legal obligation to pay and of the authority and duty to demand and receive payment. If the two do not concur and co-exist, these is no room or reason for the presumption. The principle, in this court, has been of most frequent application when a debtor to a testator or to an intestate takes probate of the will and qualifies as executor, or ob-

tains a grant of administration. Then his debt is in contemplation of law paid, for the obligation to pay and the duty and authority to demand and receive payment co-exist. Miller *v.* Irby's Adm'r, 63 Ala. 477. The obligation to pay the debts of the Electric Light & Water Company was never assumed by or rested on Carr, nor had he the authority to receive payment of them. The obligation to pay was the obligation of the water company, and not in any proper or legal sense the obligation of any of the stockholders or officers or agents. Individual liability for corporate obligations or debts, if it be not imposed by express legislative enactment, is not an incident of membership in a corporation. Smith *v.* Huckabee, 53 Ala. 191; Ang. & A. Corp., §§ 41–591. Nor is there liability upon corporate officers or agents because of contracts into which they lawfully enter on behalf of the corporation. 1 Beach Priv. Corp., § 267. In the argument of the counsel for the appellee, it is said the decision of the court below was based "on the idea that as Carr had received the $7,000 from the bonds, out of which the company had agreed to pay the debt, and it being Carr's duty, as one of the parties holding the collateral, to demand and accept payment of the collateral, and it also being his duty as president of the Water Company to pay the debt, that the law presumes the debt to have been paid." The predicate on which this idea rests is that Carr has received $7,000 from the bonds. If the predicate is not supported by the evidence, the idea is without basis. All that is said about bonds in the course of the evidence (except declarations imputed to Carr by the defendant, which are denied), is in the testimony of Womble, stating the liabilities of the water company, and is in these words: "And its bonds to the amount of $7,000 are out, and in the hands of Armstrong, cashier of a bank at Memphis." Whether the bonds were a mere deposit with Armstrong, or were intrusted to him for negotiation, is not stated. Certainly there is no fact stated from which it is fair and reasonable to suppose that Carr had received money for them to any amount. It would be as fair and reasonable to suppose that Womble, who was the secretary, treasurer and general manager of the company, had received money for the bonds,—a supposition which no trior of facts, in the course of judicial investigation, would be invited to indulge. Nor is there any foundation for the idea that it was the duty of Carr, as its president, to make payment of the debts of the water company. There is no evidence that such duty had been imposed or authority had been conferred by the company, nor that either exists by general usage. In 1 Mor. Priv. Corp., § 537, it is said: "The implied powers of the president of a corporation depend upon the nature of the company's business, and the measure of the liability delegated to him by the board of directors. It seems that a president has no greater power, by virtue of his office merely, than any other director of the company, except that he is the presiding officer of the meetings of the board."

The supreme court of New Jersey said: "In the absence of anything in the act of incorporation bestowing special power upon the president, he has, from his mere official station, no more control over the corporate property and funds than any other director. The affairs of corporate bodies are within the exclusive control of their boards of directors, from whom authority to dispose of their assets must be derived." What were the duties of the Tuscumbia Banking Company, the holder of the collateral, affected and bound by the acts of Carr, one of the partners, in reference to the collateral, we pass for future consideration. For the reasons we have given, we do not concur in the theory on which the court based its first finding or conclusion.

The second finding of the court, that the presumed payment of the collateral operated a payment of the notes on which the suit is founded, is equally untenable, If there had been the obligation to pay the collateral resting on Carr, it was an individual obligation. It did not rest on the banking company, nor was it assumed by him in the relation or capacity of a partner in the company. It is merely elementary to say that partnership assets cannot be appropriated to the payment of the individual debts of either partner. 1 Bates Partn., § 410. In Burwell *v.* Springfield, 15 Ala. 273, it was said by Collier, C. J.: "One partner cannot release a debt due from the firm, in order to extinguish his individual liability; nor can a debt due to a partnership be discharged by one of the partners applying it in payment of an individual debt owing by him to the debtor of the firm, without the knowledge and approbation of the other members of the concern." The law never presumes wrong doing, and cannot presume that a partner has misappropriated partnership assets, or that others dealing with him have participated in the misappropriation. Yet this is the presumption which seems to have been indulged to reach the conclusion that the notes were paid.

There are other grounds upon which it is insisted the judgment of the court below should be affirmed. The first is that the debt due from the Electric Light & Water Company to the defendant was accepted by the banking company in payment of the notes on which the suit is founded,— the matter of the third and fourth pleas. Payment of a debt is an affirmative plea, the burden of proving which is on the party pleading, "who must prove the payment of money, or something accepted in its stead, made to the plaintiff, or to some person authorized in his stead to receive it." 2 Greenl. Ev., § 516. As the rule has been often expressed in our decisions: "A party pleading or relying on payment must prove it. The fact is peculiarly within his knowledge, and though his adversary in pleading negatives it, the negative averment is taken as true until disproved." 3 Brick. Dig. 698, § 1. If it be conceded that the pleas are supported by the evidence of the defendant, the concession must be made that they are disproved by the evidence of Carr, with whom the transactions were had, and by whom it was alleged the payment was

accepted. It would serve no useful purpose to analyze and discuss their contradictory evidence, inquiring which is the more consistent with the conduct of men of ordinary prudence, in the course of the transactions they narrate. The court below made no finding in reference to these pleas and the existence of the facts on which they are based. If we resort to presumption, the presumption must be that the finding, in this state of the evidence, would have been that the pleas were not supported, — that the defendant had not satisfied the burden of proof resting upon him. In Lehman Bros. *v.* McQueen, 65 Ala. 572, considering a question of payment, the court said: "In the consideration of all questions of this character, dependent upon conflicting evidence, it is important to inquire, and bear in mind, upon which party lies the burden of proving the disputed fact. For when the law casts the burden of proof upon a party, if he does not offer evidence of the fact, for all the purposes of the particular case the non-existence of the fact must be assumed. Or if the evidence in reference to the fact is equally balanced, or if it does not generate a rational belief of the existence of the fact, leaving the mind in a state of doubt and uncertainty, the party affirming its existence must fail for want of proof. The burden of proving a disputed fact rests, in all cases, upon the party affirming its existence, and claiming to derive right and benefit from it. * * * A plaintiff proves the existence of a debt which the defendant claims to have paid. In the first instance, proof of the debt would rest on the plaintiff if it was denied; and if his evidence was insufficient, he would fail for want of proof. But, the debt being proved, the burden of proving payment rests upon the defendant; and if his evidence is insufficient he would fail for want of proof." The defendant has not supported the pleas of payment; the burden of proof resting upon him is not discharged.

The remaining insistence is that the banking company, by its failure to collect the debt of the Electric Light & Water Company, suffering the company to sell and dispose of all its property and franchises, whereby the debt was lost, is answerable to the defendant for the loss. It may well be doubted whether the loss of the debt is shown by the evidence. By the sale, all the property and franchises of the company were charged with a trust for the payment of its debts, — a trust which would prevail against all other than bona fide purchasers from the Tuscumbia Water Company, without notice; and the evidence shows that, at the time of the trial, the value of the property equaled, if it did not exceed, the debts. However this may be, we are not of opinion the insistence can be supported. The question depends materially on the terms of the pledge, as incorporated in the notes, connected with the attending facts. The first pledge of the debt was as collateral security for the payment of a note of $100, having 30 days to run. After the maturity of that note, there is a second pledge of the balance of the debt, to secure the payment of a note for $306, having 60 days to run. The terms of each pledge are the

same: "And I hereby give to the holder full power and authority to sell or collect, at my expense, all or any portion thereof, at any place, either in the city of Tuscumbia or elsewhere, at public or private sale, at his option, on nonperformance of above promise," etc. It is this agreement by which the rights and duties of the parties are to be measured, rather than by any general rule of law which, in the absence of the agreement, would regulate their general rights and duties on a general pledge of negotiable or non-negotiable securities for the payment of debts. Lawrence *v.* McCalmont, 2 How. (U. S.) 426; Roberts *v.* Thompson, 14 Ohio St. 1; Id., 82 Am. Dec. 465. The pledge doubtless contemplates that the holder of the notes would abstain from any and all acts by which the value of the pledge would be deteriorated, keeping it ready for restoration on payment of the notes. This is mere passiveness; and if payment had been tendered, it must have been accepted. But it was not contemplated that the holder should exercise any diligence in the collection or in making sale of the collaterals. The two are conjoined by the agreement, and committed to the mere option of the holder of the notes. There was authority to collect the collateral. At the utmost this would devolve on the holder of the notes the duty and liability of an agent, and, as an agent, binding him only to ordinary care and diligence. It is apparent that, by the exercise of no ordinary diligence, the pursuit of no ordinary legal remedies, there could have been collection of the collateral. Before the maturity of the first note the sale to the water company was effected, and thereafter, as the bill of exceptions recites, the Electric Light & Water Company ceased to exist. The inference is that the company became disorganized, rendering a suit at law against it impracticable. If it is suggested that equitable remedies could have been pursued to reach and subject the property conveyed to the water company, the answer is that such remedies as are extraordinary the holder could not be expected to pursue. We find no room in the evidence for the imputation of negligence to the banking company in reference to the collateral.

The result is the judgment must be reversed, and a judgment here rendered that the plaintiff have and recover of the defendant the principal of the notes, with the interest computed to this day, together with the costs in the circuit court and the costs of this court.

APPENDIX.

THE NEGOTIABLE INSTRUMENTS LAW

OF NEW YORK, CONNECTICUT, COLORADO AND FLORIDA, MARYLAND, VIRGINIA, AND THE DISTRICT OF COLUMBIA.

INTRODUCTION.

On the recommendation of the American Bar Association, which was made a few years ago, commissioners on Uniform State Laws have been appointed by the governments of the States, who are empowered to meet in joint conference, frame and adopt statutes, which they may recommend to their respective Legislatures for incorporation into the statute law of the States, and thereby eliminate as much as possible the present useless and confusing conflict in the commonest principles and provisions of private law. At the meeting of the commissioners in 1896, The Negotiable Instruments Law, which is substantially a reproduction of the English Act on Bills of Exchange and Promissory Notes, was adopted and recommended for general enactment by the State Legislatures.

In 1897, by the action of the Legislatures of New York, Connecticut, Colorado, and Florida, this codification of the commercial law has become the law of these States, superseding all preceding local statutes. In 1898, the law was adopted in Maryland and Virginia, and is at the time of going

to press before the United States Senate, having already passed the House of Representatives with every prospect of its adoption as the law of the District of Columbia. It is confidently expected that this code will be ultimately enacted in all of the United States, particularly since it has been adopted by the great commercial State of New York, and thirty States are now represented by commissioners at these annual conferences. In a number of the States, it has already been recommended, in Massachusetts by the Governor and in South Carolina by the Supreme Court.

The Negotiable Instruments Law, as it has been enacted by the Legislature of New York, is herewith appended, in the form in which it has been so adopted, with the corrections of typographical errors, as ordered by the act of 1898. But in order that the reader of this book may be able to refer to the numbers of the sections, as they appear in the law, as it has been adopted by the other States, these numbers are appended to the respective sections in parentheses. The numbers of the sections are the same in Connecticut, Colorado and Florida, except that what appears as Art. I. in the New York statute, and as a preamble in the statutes of Connecticut and Florida, is in Colorado put at the end of the statute and numbered § 190. In the New York statute there are three sections (§§ 330–332) which do not appear in the statutes, as adopted by the other States. In every other respect, the phraseology and contents of the sections are identical.

THE NEGOTIABLE INSTRUMENTS LAW.

CHAPTER 612, LAWS 1897; CHAPTER 50 OF THE GENERAL LAWS.

(Became a law May 19, 1897.)

CHAPTER 50 OF THE GENERAL LAWS.

THE NEGOTIABLE INSTRUMENTS LAW.

Article I. General Provisions. (§ 1–17.)

II. Form and Interpretation of Negotiable Instruments. (§§ 22–42.)

III. Consideration. (§§ 50–55.)

IV. Negotiation. (§§ 60–80.)

V. Rights of Holder. (§§ 90–98.)

VI. Liabilities of Parties. (§§ 110–119.)

VII. Presentment for Payment. (§§ 130–148.)

VIII. Notice of Dishonor. (§§ 160–189.)

IX. Discharge of Negotiable Instruments. (§§ 200–206.)

X. Bills of Exchange; Form and Interpretation. (§§ 210–215.)

XI. Acceptance. (§§ 220–230.)

XII. Presentment for Acceptance. (§§ 240–248.)

XIII. Protest. (§§ 260–268.)

XIV. Acceptance for Honor. (§§ 280–290.)

XV. Payment for Honor. (§§ 300–306.)

XVI. Bills in a Set. (§§ 310–315.)

XVII. Promissory Notes and Checks. (§§ 320–325.)

XVIII. Notes Given for a Patent Right and for a Speculative Consideration. (§§ 330–332.)

XIX. Laws Repealed, When to Take Effect. (§§ 340–341.)

ARTICLE I.

GENERAL PROVISIONS.[1]

Section 1. Short title.
2. Definitions and meaning of terms.
3. Person primarily liable on instrument.
4. Reasonable time; what constitutes.
5. Time how computed; when last day falls on holiday.
6. Application of chapter.
7. Rule of law merchant; when governs.

SECTION 1. **Short title.**— This act shall be known as the negotiable instruments law.

§ 2. **Definitions and meaning of terms.**— In this act, unless the context otherwise requires:—

"Acceptance" means an acceptance completed by delivery or notification.

"Action" includes counter-claim and set-off.

"Bank" includes any person or association of persons carrying on the business of banking, whether incorporated or not.

"Bearer" means the person in possession of a bill or note which is payable to bearer.

"Bill" means bill of exchange, and "note" means negotiable promissory note.

"Delivery" means transfer of possession, actual or constructive, from one person to another.

"Holder" means the payee or indorsee of a bill or note, who is in possession of it, or the bearer thereof.

[1] (In Connecticut and Florida, Art. I. appears as a preamble, without being sectionized; while in Colorado, it appears at the end of the statute as § 190.)

"Indorsement" means an indorsement completed by delivery.

"Instrument" means negotiable instrument.

"Issue" means the first delivery of the instrument, complete in form to a person who takes it as a holder.

"Person" includes a body of persons, whether incorporated or not.

"Value" means valuable consideration.

"Written" includes printed, and "writing" includes print.

§ 3. **Person primarily liable on instrument.**— The person "primarily" liable on an instrument is the person who by the terms of the instrument is absolutely required to pay the same. All other parties are "secondarily" liable.

§ 4. **Reasonable time, what constitutes.**— In determining what is a "reasonable time" or an "unreasonable time" regard is to be had to the nature of the instrument, the usage of trade or business (if any) with respect to such instruments, and the facts of the particular case.

§ 5. **Time, how computed; when last day falls on holiday.**— Where the day, or the last day, for doing any act herein required or permitted to be done falls on Sunday or on a holiday, the act may be done on the next succeeding secular or business day.

§ 6. **Application of chapter.**— The provisions of this act do not apply to negotiable instruments made and delivered prior to the passage hereof.

§ 7. **Law merchant; when governs.**— In any case not provided for in this act the rules of the law merchant shall govern.

ARTICLE II.

FORM AND INTERPRETATION.

Section 20. Form of negotiable instrument.
21. Certainty as to sum; what constitutes
22. When promise is unconditional.
23. Determinable future time; what constitutes.
24. Additional provisions not affecting negotiability.
25. Omissions; seal; particular money.
26. When payable on demand.
27. When payable to order.
28. When payable to bearer.
29. Terms when sufficient.
30. Date, presumption as to.
31. Ante-dated and post-dated.
32. When date may be inserted.
33. Blanks, when may be filled.
34. Incomplete instrument not delivered.
35. Delivery; when effectual; when presumed.
36. Construction where instrument is ambiguous.
37. Liability of persons signing in trade or assumed name.
38. Signature by agent; authority; how shown.
39. Liability of person signing as agent, et cetera.
40. Signature by procuration; effect of.
41. Effect of indorsement by infant or corporation.
42. Forged signature; effect of.

§ 20 (§ 1). **Form of negotiable instrument.**— An instrument to be negotiable must conform to the following requirements :—

1. It must be in writing and signed by the maker or drawer.

2. Must contain an unconditional promise or order to pay a sum certain in money;

3. Must be payable on demand, or at a fixed or determinable future time;

4. Must be payable to order or to bearer, and

5. Where the instrument is addressed to a drawee, he must be named or otherwise indicated therein with reasonable certainty.

§ 21 (§ 2). **Certainty as to sum; what constitutes.**— The sum payable is a sum certain within the meaning of this act, although it is to be paid:—

1. With interest; or

2. By stated installments; or

3. By stated installments, with a provision that upon default in payment of any installment or of interest, the whole shall become due; or

4. With exchange, whether at a fixed rate or at the current rate; or

5. With costs of collection or an attorney's fee, in case payment shall not be made at maturity.

§ 22 (§ 3). **When promise is unconditional.**— An unqualified order or promise to pay is unconditional within the meaning of this act, though coupled with:—

1. An indication of a particular fund out of which reimbursement is to be made, or a particular account to be debited with the amount; or

2. A statement of the transaction which gives rise to the instrument.

But an order or promise to pay out of a particular fund is not unconditional.

§ 23 (§ 4). **Determinable future time; what constitutes.**— An instrument is payable at a determinable future time, within the meaning of this act, which is expressed to be payable:—

1. At a fixed period after date or sight; or

2. On or before a fixed or determinable future time specified therein; or

3. On or at a fixed period after the occurrence of a specified event, which is certain to happen, though the time of happening be uncertain.

An instrument payable upon a contingency is not negotiable, and the happening of the event does not cure the defect.

§ 24 (§ 5). **Additional provisions not affecting negotiability.**— An instrument which contains an order or promise to do any act in addition to the payment of money is not negotiable. But the negotiable character of an instrument otherwise negotiable is not affected by a provision which:—

1. Authorizes the sale of collateral securities in case the instrument be not paid at maturity; or

2. Authorizes a confession of judgment if the instrument be not paid at maturity; or

3. Waives the benefit of any law intended for the advantage or protection of the obligor; or

4. Gives the holder an election to require something to be done in lieu of payment of money.

But nothing in this section shall validate any provision or stipulation otherwise illegal.

§ 25 (§ 6). **Omissions; seal; particular money.**— The validity and negotiable character of an instrument are not affected by the fact that:—

1. It is not dated; or

2. Does not specify the value given, or that any value has been given therefor; or

3. Does not specify the place where it is drawn or the place where it is payable; or

4. Bears a seal; or

5. Designates a particular kind of current money in which payment is to be made.

But nothing in this section shall alter or repeal any statute requiring in certain cases the nature of the consideration to be stated in the instrument.

§ 26 (§ 7). **When payable on demand.**— An instrument is payable on demand:—

1. Where it is expressed to be payable on demand, or at sight, or on presentation; or

2. In which no time for payment is expressed.

Where an instrument is issued, accepted or indorsed when overdue, it is, as regards the person so issuing, accepting or indorsing it, payable on demand.

§ 27 (§ 8). **When payable to order.**— The instrument is payable to order where it is drawn payable to the order of a specified person or to him or his order. It may be drawn payable to the order of:—

1. A payee who is not a maker, drawer or drawee; or

2. The drawer or maker; or

3. The drawee; or

4. Two or more payees jointly; or

5. One or some of several payees; or

6. The holder of an office for the time being.

Where the instrument is payable to order the payee must be named or otherwise indicated therein with reasonable certainty.

§ 28 (§ 9). **When payable to bearer.**— The instrument is payable to bearer:—

1. When it is expressed to be so payable; or

2. When it is payable to a person named therein or bearer; or

3. When it is payable to the order of a fictitious or non-existing person, and such fact was known to the person making it so payable; or

4. When the name of the payee does not purport to be the name of any person; or

5. When the only or last indorsement is an indorsement in blank.

§ 29 (§ 10). **Terms, when sufficient.**— The instrument need not follow the language of this act, but any terms are sufficient which clearly indicate an intention to conform to the requirements thereof.

§ 30 (§ 11). **Date, presumption as to.**— Where the instrument or an acceptance or any indorsement thereon is dated, such date is deemed *prima facie* to be the date of the making, drawing, acceptance or indorsement, as the case may be.

§ 31 (§ 12). **Ante-dated and post-dated.**— The instrument is not invalid for the reason only that it is ante-dated or post-dated, provided this is not done for an illegal or fraudulent purpose. The person to whom an instrument so dated is delivered acquires the title thereto as of the date of delivery.

§ 32 (§ 13). **When date may be inserted.**— Where an instrument expressed to be payable at a fixed period after date is issued undated, or where the acceptance of an instrument payable at a fixed period after sight is undated, any holder may insert therein the true date of issue or acceptance, and the instrument shall be payable accordingly.

The insertion of a wrong date does not avoid the instrument in the hands of a subsequent holder in due course; but as to him, the date so inserted is to be regarded as the true date.

§ 33 (§ 14). **Blanks; when may be filled.**— Where the instrument is wanting in any material particular, the person in possession thereof has a *prima facie* authority to complete it by filling up the blanks therein. And a signature on a blank paper delivered by the person making the signature in order that the paper may be converted into a negotiable instrument operates as a *prima facie* authority to fill it up as such for any amount. In order, however, that any such instrument, when completed, may be enforced against any person who became a party thereto prior to its completion, it must be filled up strictly in accordance with the authority given and within a reasonable time. But if any such instrument, after completion, is negotiated to a holder in due course, it is valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up strictly in accordance with the authority given and within a reasonable time.

§ 34 (§ 15). **Incomplete instrument not delivered.**— Where an incomplete instrument has not been delivered it will not, if completed and negotiated, without authority, be a valid contract in the hands of any holder, as against any person whose signature was placed thereon before delivery.

§ 35 (§ 16). **Delivery; when effectual; when presumed.**— Every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument

for the purpose of giving effect thereto. As between immediate parties, and as regards a remote party other than a holder in due course, the delivery, in order to be effectual, must be made either by or under the authority of the party making, drawing, accepting or indorsing, as the case may be; and in such case the delivery may be shown to have been conditional, or for a special purpose only, and not for the purpose of transferring the property in the instrument. But where the instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him so as to make them liable to him is conclusively presumed. And where the instrument is no longer in the possession of a party whose signature appears thereon, a valid and intentional delivery by him is presumed until the contrary is proved.

§ 36 (§ 17). **Construction where instrument is ambiguous.**— Where the language of the instrument is ambiguous, or there are omissions therein, the following rules of construction apply: —

1. Where the sum payable is expressed in words and also in figures and there is a discrepancy between the two, the sum denoted by the words is the sum payable; but if the words are ambiguous or uncertain, references may be had to the figures to fix the amount;

2. Where the instrument provides for the payment of interest, without specifying the date from which interest is to run, the interest runs from the date of the instrument, and if the instrument is undated, from the issue thereof;

3. Where the instrument is not dated, it will be considered to be dated as of the time it was issued;

4. Where there is a conflict between the written and

printed provisions of the instrument, the written provisions prevail;

5. Where the instrument is so ambiguous that there is doubt whether it is a bill or note, the holder may treat it as either at his election;

6. Where a signature is so placed upon the instrument that it is not clear in what capacity the person making the same intended to sign, he is to be deemed an indorser;

7. Where an instrument containing the words "I promise to pay" is signed by two or more persons, they are deemed to be jointly and severally liable thereon.

§ 37 (§ 18). **Liability of person signing in trade or assumed name.**— No person is liable on the instrument whose signature does not appear thereon, except as herein otherwise expressly provided. But one who signs in a trade or assumed name will be liable to the same extent as if he had signed in his own name.

§ 38 (§ 19). **Signature by agent; authority; how shown.**— The signature of any party may be made by a duly authorized agent. No particular form of appointment is necessary for this purpose; and the authority of the agent may be established as in other cases of agency.

§ 39 (§ 20). **Liability of person signing as agent, etc.**— Where the instrument contains or a person adds to his signature words indicating that he signs for or on behalf of a principal, or in a representative capacity, he is not liable on the instrument if he was duly authorized; but the mere addition of words describing him as an agent, or as filling a representative character, without disclosing his principal, does not exempt him from personal liability.

§ 40 (§ 21). **Signature by procuration; effect of.**— A signature by "procuration" operates as notice that the agent has but a limited authority to sign, and the principal is bound only in case the agent in so signing acted within the actual limits of his authority.

§ 41 (§ 22). **Effect of indorsement by infant or corporation.** — The indorsement or assignment of the instrument by a corporation or by an infant passes the property therein, notwithstanding that from want of capacity the corporation or infant may incur no liability thereon.

§ 42 (§ 23). **Forged signature; effect of.** — Where a signature is forged or made without authority of the person whose signature it purports to be, it is wholly inoperative, and no right to retain the instrument, or to give a discharge therefor, or to enforce payment thereof against any party thereto, can be acquired through or under such signature, unless the party against whom it is sought to enforce such right is precluded from setting up the forgery or want of authority.

ARTICLE III.

CONSIDERATION OF NEGOTIABLE INSTRUMENTS.

Section 50. Presumption of consideration.
51. What constitutes consideration.
52. What constitutes holder for value.
53. When lien on instrument constitutes holder for value.
54. Effect of want of consideration.
55. Liability of accommodation party.

§ 50 (§ 24). **Presumption of consideration.** — Every negotiable instrument is deemed *prima facie* to have been issued for a valuable consideration; and every person whose signature appears thereon to have become a party thereto for value.

§ 51 (§ 25). **Consideration, what constitutes.** — Value is any consideration sufficient to support a simple contract. An antecedent or pre-existing debt constitutes value.; and is deemed such whether the instrument is payable on demand or at a future time.

§ 52 (§ 26). **What constitutes holder for value.** — Where value has at any time been given for the instrument, the holder is deemed a holder for value in respect to all parties who became such prior to that time.

§ 53 (§ 27). **When lien on instrument constitutes holder for value.** — Where the holder has a lien on the instrument, arising either from contract or by implication of law, he is deemed a holder for value to the extent of his lien.

§ 54 (§ 28). **Effect of want of consideration.** — Absence or failure of consideration is matter of defense as against any person not a holder in due course; and partial failure of consideration is a defense *pro tanto* whether the failure is an ascertained and liquidated amount or otherwise.

§ 55 (§ 29). **Liability of accommodation party.** — An accommodation party is one who has signed the instrument as maker, drawer, acceptor or indorser, without receiving value therefor, and for the purpose of lending his name to some other person. Such a person is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party.

ARTICLE IV.

NEGOTIATION.

Section 60. What constitutes negotiation.
61. Indorsement; how made.
62. Indorsement must be of entire instrument.
63. Kinds of indorsement.
64. Special indorsement; indorsement in blank.
65. Blank indorsement; how changed to special indorsement.
66. When indorsement restrictive.
67. Effect of restrictive indorsement; rights of indorsee.
68. Qualified indorsement.
69. Conditional indorsement.
70. Indorsement of instrument payable to bearer.
71. Indorsement where payable to two or more persons.
72. Effect of instrument drawn or indorsed to a person as cashier.
73. Indorsement where name is misspelled, et cetera.
74. Indorsement in representative capacity.
75. Time of indorsement; presumption.
76. Place of indorsement; presumption.
77. Continuation of negotiable character.
78. Striking out indorsement.
79. Transfer without indorsement; effect of.
80. When prior party may negotiate instrument.

§ 60 (§ 30). **What constitutes negotiation.**— An instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof. If payable to bearer it is negotiated by delivery ; if payable to order it is negotiated by the indorsement of the holder completed by delivery.

§ 61 (§ 31). **Indorsement; how made.**— The indorsement must be written on the instrument itself or upon a

paper attached thereto. The signature of the indorser, without additional words, is a sufficient indorsement.

§ 62 (§ 32). **Indorsement must be of entire instrument.**— The indorsement must be an indorsement of the entire instrument. An indorsement, which purports to transfer to the indorsee a part only of the amount payable, or which purports to transfer the instrument to two or more indorsees severally, does not operate as a negotiation of the instrument. But where the instrument has been paid in part, it may be indorsed as to the residue.

§ 63 (§ 33). **Kinds of indorsement.**— An indorsement may be either special or in blank; and it may also be either restrictive or qualified, or conditional.

§ 64 (§ 34). **Special indorsement; indorsement in blank.** — A special indorsement specifies the person to whom, or to whose order the instrument is to be payable; and the indorsement of such indorsee is necessary to the further negotiation of the instrument. An indorsement in blank specifies no indorsee, and an instrument so indorsed is payable to bearer, and may be negotiated by delivery.

§ 65 (§ 35). **Blank indorsement; how changed to special indorsement.**— The holder may convert a blank indorsement into a special indorsement by writing over the signature of the indorser in blank any contract consistent with the character of the indorsement.

§ 66 (§ 36). **When indorsement restrictive.**— An indorsement is restrictive, which either: —

1. Prohibits the further negotiation of the instrument; or
2. Constitutes the indorsee the agent of the indorser; or

3. Vests the title in the indorsee in trust for or to the use of some other person.

But the mere absence of words implying power to negotiate does not make an indorsement restrictive.

§ 67 (§ 37). **Effect of restrictive indorsement; rights of indorsee.**— A restrictive indorsement confers upon the indorsee the right: —

1. To receive payment of the instrument;

2. To bring any action thereon that the indorser could bring;

3. To transfer his rights as such indorsee, where the form of the indorsement authorizes him to do so.

But all subsequent indorsees acquire only the title of the first indorsee under the restrictive indorsement.

§ 68 (§ 38). **Qualified indorsement.**— Qualified indorsement constitutes the indorser a mere assignor of the title to the instrument. It may be made by adding to the indorser's signature the words "without recourse" or any words of similar import. Such an indorsement does not impair the negotiable character of the instrument.

§ 69 (§ 39). **Conditional indorsement.**— Where an indorsement is conditional, a party required to pay the instrument may disregard the condition, and make payment to the indorsee or his transferee, whether the condition has been fulfilled or not. But any person to whom an instrument so indorsed is negotiated, will hold the same, or the proceeds thereof, subject to the rights of the person indorsing conditionally.

§ 70 (§ 40). **Indorsement of instrument payable to bearer.**— Where an instrument, payable to bearer, is in-

dorsed specially, it may nevertheless be further negotiated by delivery; but the person indorsing specially is liable as indorser to only such holders as make title through his indorsement.

§ 71 (§ 41). **Indorsement where payable to two or more persons.**— Where an instrument is payable to the order of two or more payees or indorsers who are not partners, all must indorse, unless the one indorsing has authority to indorse for the others.

§ 72 (§ 42). **Effect of instrument drawn or indorsed to a person as cashier.**— Where an instrument is drawn or indorsed to a person as "cashier" or other fiscal officer of a bank or corporation, it is deemed *prima facie* to be payable to the bank or corporation of which he is such officer; and may be negotiated by either the indorsement of the bank or corporation, or the indorsement of the officer.

§ 73 (§ 43). **Indorsement where name is misspelled, et cetera.**— Where the name of a payee or indorsee is wrongly designated or misspelled, he may indorse the instrument as therein described, adding, if he think fit, his proper signature.

§ 74. (§ 44). **Indorsement in representative capacity.**— Where any person is under obligations to indorse in a representative capacity, he may indorse in such terms as to negative personal liability.

§ 75 (§ 45). **Time of indorsement; presumption.**—Except where an indorsement bears date after the maturity of the instrument, every negotiation is deemed *prima facie* to have been effected before the instrument was overdue.

§ 76 (§ 46). **Place of indorsement; presumption.**— Except where the contrary appears, every indorsement is presumed *prima facie* to have been made at the place where the instrument is dated.

§ 77 (§ 47). **Continuation of negotiable character.**— An instrument negotiable in its origin continues to be negotiable until it has been restrictively indorsed or discharged by payment or otherwise.

§ 78 (§ 48). **Striking out indorsement.**— The holder may at any time strike out any indorsement which is not necessary to his title. The indorser whose indorsement is struck out, and all indorsers subsequent to him, are thereby relieved from liability on the instrument.

§ 79 (§ 49). **Transfer without indorsement; effect of.**— Where the holder of an indorsement payable to his order transfers it for value without indorsing it, the transfer vests in the transferee such title as the transferrer had therein, and the transferee acquires, in addition, the right to have the indorsement of the transferrer. But for the purpose of determining whether the transferee is a holder in due course, the negotiation takes effect as of the time when the indorsement is actually made.

§ 80 (§ 50). **When prior party may negotiate instrument.**— Where an instrument is negotiated back to a prior party, such party may, subject to the provisions of this act, reissue and further negotiate the same. But he is not entitled to enforce payment thereof against any intervening party to whom he was personally liable.

ARTICLE V.

RIGHTS OF HOLDERS.

Section 90. Rights of holder to sue; payment.
91. What constitutes a holder in due course.
92. When person not deemed holder in due course.
93. Notice before full amount paid.
94. When title defective.
95. What constitutes notice of defect.
96. Rights of holder in due course.
97. When subject to original defenses.
98. Who deemed holder in due course.

§ 90 (§ 51). **Right of holder to sue; payment.**— The holder of a negotiable instrument may sue thereon in his own name; and payment to him in due course discharges the instrument.

§ 91 (§ 52). **What constitutes a holder in due course.**— A holder in due course is a holder who has taken the instrument under the following conditions: —

1. That it is complete and regular upon its face;

2. That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact;

3. That he took it in good faith and for value;

4. That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it.

§ 92 (§ 53). **When person not deemed holder in due course.**— Where an instrument payable on demand is negotiated an unreasonable length of time after its issue, the holder is not deemed a holder in due course.

§ 93 (§ 54). **Notice before full amount paid.**— Where the transferee receives notice of any infirmity in the instrument or defect in the title of the person negotiating the same before he has paid the full amount agreed to be paid therefor, he will be deemed a holder in due course only to the extent of the amount theretofore paid by him.

§ 94 (§ 55). **When title defective.**— The title of a person who negotiates an instrument is defective within the meaning of this act when he obtained the instrument, or any signature thereto, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amounts to a fraud.

§ 95 (§ 56). **What constitutes notice of defect.**— To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith.

§ 96 (§ 57). **Rights of holder in due course.**— A holder in due course holds the instrument free from any defect of title of prior parties and free from defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon.

§ 97 (§ 58). **When subject to original defenses.**— In the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defenses as if it were non-negotiable. But a holder who derives his title through a holder in due course,

and who is not himself a party to any fraud or illegality affecting the instrument, has all the rights of such former holder in respect of all parties prior to the latter.

§ 98 (§ 59). **Who deemed holder in due course.**—Every holder is deemed *prima facie* to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as a holder in due course. But the last-mentioned rule does not apply in favor of a party who became bound on the instrument prior to the acquisition of such defective title.

ARTICLE VI.

LIABILITIES OF PARTIES.

Section 110. Liability of maker.
111. Liability of drawer.
112. Liability of acceptor.
113. When person deemed indorser.
114. Liability of irregular indorser.
115. Warranty; where negotiation by delivery, et cetera.
116. Liability of general indorsers.
117. Liability of indorser where paper negotiable by delivery.
118. Order in which indorsers are liable.
119. Liability of agent or broker.

§ 110 (§ 60). **Liability of maker.**— The maker of a negotiable instrument by making it engages that he will pay it according to its tenor; and admits the existence of the payee and his then capacity to indorse.

§ 111 (§ 61). **Liability of drawer.**— The drawer by drawing the instrument admits the existence of the payee and his then capacity to indorse; and engages that on due presentment the instrument will be accepted and paid, or both, according to its tenor, and that if it be dishonored, and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder, or to any subsequent indorser who may be compelled to pay it. But the drawer may insert in the instrument an express stipulation negativing or limiting his own liability to the holder.

§ 112 (§ 62). **Liability of acceptor.**— The acceptor by accepting the instrument engages that he will pay it according to the tenor of his acceptance and admits:—

1. The existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the instrument; and

2. The existence of the payee and his then capacity to indorse.

§ 113 (§ 63). **When person deemed indorser.**— A person placing his signature upon an instrument otherwise than as maker, drawer or acceptor is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity.

§ 114 (§ 64). **Liability of irregular indorser.**— Where a person, not otherwise a party to an instrument, places thereon his signature in blank before delivery, he is liable as indorser in accordance with the following rules:—

1. If the instrument is payable to the order of a third person, he is liable to the payee and to all subsequent parties.

2. If the instrument is payable to the order of the maker or drawer, or is payable to bearer, he is liable to all parties subsequent to the maker or drawer.

3. If he signs for the accommodation of the payee, he is liable to all parties subsequent to the payee.

§ 115 (§ 65). **Warranty where negotiation by delivery, et cetera.**— Every person negotiating an instrument by delivery or by a qualified indorsement, warrants:—

1. That the instrument is genuine and in all respects what it purports to be;

2. That he has a good title to it;

3. That all prior parties had capacity to contract;

4. That he has no knowledge of any fact which would impair the validity of the instrument or render it valueless.

But when the negotiation is by delivery only, the warranty extends in favor of no holder other than the immediate transferee. The provisions of subdivision three of this section do not apply to persons negotiating public or corporate securities, other than bills and notes.

§ 116 (§ 66). **Liability of general indorser.**— Every indorser who indorses without qualification, warrants to all subsequent holders in due course:—

1. The matter and things mentioned in subdivisions one, two and three of the next preceding section; and,

2. That the instrument is at the time of his indorsement valid and subsisting.

And, in addition, he engages that on due presentment, it shall be accepted or paid, or both, as the case may be, according to its tenor, and that if it be dishonored, and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder, or to any subsequent indorser who may be compelled to pay it.

§ 117 (§ 67). **Liability of indorser where paper negotiable by delivery.**— Where a person places his indorsement on an instrument negotiable by delivery he incurs all the liabilities of an indorser.

§ 118 (§ 68). **Order in which indorsers are liable.**— As respects one another, indorsers are liable *prima facie* in the order in which they indorse; but evidence is admissible

to show that as between or among themselves they have agreed otherwise. Joint payees or joint indorsees who indorse are deemed to indorse jointly and severally.

§ 119 (§ 69). **Liability of agent or broker.**— Where a broker or other agent negotiates an instrument without indorsement, he incurs all the liabilities prescribed by section one hundred and fifteen of this act, unless he discloses the name of his principal, and the fact that he is acting only as agent.

ARTICLE VII.

PRESENTMENT FOR PAYMENT.

Section 130. Effect of want of demand on principal debtor.
131. Presentment where instrument is not payable on demand.
132. What constitutes a sufficient presentment.
133. Place of presentment.
134. Instrument must be exhibited.
135. Presentment where instrument payable at bank.
136. Presentment where principal debtor is dead.
137. Presentment to persons liable as partners.
138. Presentment to joint debtors.
139. When presentment not required to charge the drawer.
140. When presentment not required to charge the indorser.
141. When delay in making presentment is excused.
142. When presentment may be dispensed with.
143. When instrument dishonored by non-payment.
144. Liability of person secondarily liable, when instrument dishonored.
145. Time of maturity.
146. Time; how computed.
147. Rule where instrument payable at bank.
148. What constitutes payment in due course.

§ 130 (§ 70). **Effect of want of demand on principal debtor.**— Presentment for payment is not necessary in order to charge the person primarily liable on the instrument; but if the instrument is, by its terms, payable at a special place, and he is able and willing to pay it there at maturity, such ability and willingness are equivalent to a tender of payment upon his part. But except as herein otherwise provided, presentment for payment is necessary in order to charge the drawer and indorsers.

§ 131 (§ 71). **Presentment where instrument is not payable on demand.**— Where the instrument is not payable on demand, presentment must be made on the day it falls due. Where it is payable on demand, presentment must be made within a reasonable time after its issue, except that in the case of a bill of exchange, presentment for payment will be sufficient if made within a reasonable time after the last negotiation thereof.

§ 132 (§ 72). **What constitutes a sufficient presentment.**— Presentment for payment, to be sufficient, must be made: —

1. By the holder, or by some person authorized to receive payment on his behalf;

2. At a reasonable hour on a business day;

3. At a proper place as herein defined;

4. To the person primarily liable on the instrument, or if he is absent or inaccessible, to any person found at the place where the presentment is made.

§ 133 (§ 73). **Place of presentment.** — Presentment for payment is made at the proper place:—

1. Where a place of payment is specified in the instrument and it is there presented;

2. Where no place of payment is specified, but the address of the person to make payment is given in the instrument and it is there presented;

3. Where no place of payment is specified and no address is given and the instrument is presented at the usual place of business or residence of the person to make payment;

4. In any other case, if presented to the person to make payment wherever he can be found, or if presented at his last known place of business or residence.

§ 134 (§ 74). **Instrument must be exhibited.** — The instrument must be exhibited to the person from whom payment is demanded, and when it is paid must be delivered up to the party paying it.

§ 135 (§ 75). **Presentment where instrument payable at bank.** — Where the instrument is payable at a bank, presentment must be made during banking hours, unless the person to make payment has no funds there to meet it at any time during the day, in which case presentment at any hour before the bank is closed on that day is sufficient.

§ 136 (§ 76). **Presentment where principal debtor is dead.** — Where the person primarily liable on the instrument is dead, and no place of payment is specified, presentment for payment must be made to his personal representative, if such there be, and if, with the exercise of reasonable diligence, he can be found.

§ 137 (§ 77). **Presentment to persons liable as partners.** — Where the persons primarily liable on the instrument are liable as partners, and no place of payment is specified, presentment for payment may be made to any one of them, even though there has been a dissolution of the firm.

§ 138 (§ 78). **Presentment to joint debtors.** — Where there are several persons not partners primarily liable on the instrument, and no place of payment is specified, presentment must be made to them all.

§ 139 (§ 79). **When presentment not required to charge the drawer.** — Presentment for payment is not required in order to charge the drawer where he has no right to expect or require that the drawee or acceptor will pay the instrument.

§ 140 (§ 80). **When presentment not required to charge the indorser.**— Presentment for payment is not required in order to charge an indorser where the instrument was made or accepted for his accommodation, and he has no reason to expect that the instrument will be paid if presented.

§ 141 (§ 81). **When delay in making presentment is excused.**— Delay in making presentment for payment is excused when the delay is caused by circumstances beyond the control of the holder and not imputable to his fault, misconduct or negligence. When the cause of delay ceases to operate, presentment must be made with reasonable diligence.

§ 142 (§ 82). **When presentment may be dispensed with.**— Presentment for payment is dispensed with:—

1. Where after the exercise of reasonable diligence presentment as required by this act cannot be made;

2. Where the drawee is a fictitious person;

3. By waiver of presentment expressed or implied.

§ 143 (§ 83). **When instrument dishonored by non-payment.**— The instrument is dishonored by non-payment when:—

1. It is duly presented for payment and payment is refused or cannot be obtained; or

2. Presentment is excused and the instrument is overdue and unpaid.

§ 144 (§ 84). **Liability of persons secondarily liable, when instrument dishonored.**— Subject to the provisions of this act, when the instrument is dishonored by non-payment, an immediate right of recourse to all parties secondarily liable thereon, accrues to the holder.

§ 145 (§ 85). **Time of maturity.**— Every negotiable instrument is payable at the time fixed therein without grace. When the day of maturity falls upon Sunday, or a holiday, the instrument is payable on the next succeeding business day. Instruments falling due on Saturday are to be presented for payment on the next succeeding business day, except that instruments payable on demand may, at the option of the holder, be presented for payment before twelve o'clock noon on Saturday when that entire day is not a holiday.

§ 146 (§ 86). **Time; how computed.**—Where the interest is payable at a fixed period after date, after sight, or after the happening of a specified event, the time of payment is determined by excluding the day from which the time is to begin to run, and by including the date of payment.

§ 147 (§ 87). **Rule where instrument payable at bank.**— Where the instrument is made payable at a bank it is equivalent to an order to the bank to pay the same for the account of the principal debtor thereon.

§ 148 (§ 88). **What constitutes payment in due course.**— Payment is made in due course when it is made at or after the maturity of the instrument to the holder thereof in good faith and without notice that his title is defective.

ARTICLE VIII.

NOTICE OF DISHONOR.

Section 160. To whom notice of dishonor must be given.
161. By whom given.
162. Notice given by agent.
163. Effect of notice given on behalf of holder.
164. Effect where notice is given by party entitled thereto.
165. When agent may give notice.
166. When notice sufficient.
167. Form of notice.
168. To whom notice may be given.
169. Notice where party is dead.
170. Notice to partners.
171. Notice to persons jointly liable.
172. Notice to bankrupt.
173. Time within which notice must be given.
174. Where parties reside in same place.
175. Where parties reside in different places.
176. When sender deemed to have given due notice.
177. Deposit in post-office, what constitutes.
178. Notice to subsequent parties, time of.
179. When notice must be sent.
180. Waiver of notice.
181. Whom affected by waiver.
182. Waiver of protest.
183. When notice dispensed with.
184. Delay in giving notice; how excused.
185. When notice need not be given to drawer.
186. When notice need not be given to indorser.
187. Notice of non-payment where acceptance refused.
188. Effect of omission to give notice of non-acceptance.
189. When protest need not be made; when must be made.

§ 160 (§ 89). **To whom notice of dishonor must be given.**— Except as herein otherwise provided, when a

negotiable instrument has been dishonored by non-acceptance or non-payment, notice of dishonor must be given to the drawer and to each indorser, and any drawer or indorser to whom such notice is not given is discharged.

§ 161 (§ 90). **By whom given.**— The notice may be given by or on behalf of the holder, or by or on behalf of any party to the instrument who might be compelled to pay it to the holder, and who, upon taking it up would have a right to reimbursement from the party to whom the notice is given.

§ 162 (§ 91). **Notice given by agent.**— Notice of dishonor may be given by an agent either in his own name or in the name of any party entitled to give notice, whether that party be his principal or not.

§ 163 (§ 92). **Effect of notice given on behalf of holder.**— Where notice is given by or on behalf of the holder, it inures for the benefit of all subsequent holders and all prior parties who have a right of recourse against the party to whom it is given.

§ 164 (§ 93). **Effect where notice is given by party entitled thereto.**— Where notice is given by or on behalf of a party entitled to give notice, it inures for the benefit of the holder and all parties subsequent to the party to whom notice is given.

§ 165 (§ 94). **When agent may give notice.** — Where the instrument has been dishonored in the hands of an agent, he may either himself give notice to the parties liable thereon, or he may give notice to his principal. If he give notice to his principal, he must do so within the same time as if he were the holder, and the principal upon the

receipt of such notice has himself the same time for giving notice as if the agent had been an independent holder.

§ 166 (§ 95). **When notice sufficient.** — A written notice need not be signed, and an insufficient written notice may be supplemented and validated by verbal communication. A misdescription of the instrument does not vitiate the notice unless the party to whom the notice is given is in fact misled thereby.

§ 167 (§ 96). **Form of notice.**— The notice may be in writing or merely oral and may be given in any terms which sufficiently identify the instrument, and indicate that it has been dishonored by non-acceptance or non-payment. It may in all cases be given by delivering it personally or through the mails.

§ 168 (§ 97). **To whom notice may be given.**— Notice of dishonor may be given either to the party himself or to his agent in that behalf.

§ 169 (§ 98). **Notice where party is dead.**— When any party is dead, and his death is known to the party giving notice, the notice must be given to a personal representative if there be one, and if, with reasonable diligence, he can be found. If there be no personal representative, notice may be sent to the last residence or last place of business of the deceased.

§ 170 (§ 99). **Notice to partners.**— Where the parties to be notified are partners, notice to any one partner is notice to the firm even though there has been a dissolution.

§ 171 (§ 100). **Notice to persons jointly liable.**—Notice to joint parties who are not partners must be given to each

of them, unless one of them has authority to receive such notice for the others.

§ 172 (§ 101). **Notice to bankrupt.**— Where a party has been adjudged a bankrupt or an insolvent, or has made an assignment for the benefit of creditors, notice may be given either to the party himself or to his trustee or assignee.

§ 173 (§ 102). **Time within which notice must be given.**— Notice may be given as soon as the instrument is dishonored; and unless delay is excused as hereinafter provided, must be given within the times fixed by this act.

§ 174 (§ 103). **Where parties reside in same place.**— Where the person giving and the person to receive notice reside in the same place, notice must be given within the following times:—

1. If given at the place of business of the person to receive notice, it must be given before the close of business hours on the day following;
2. If given at his residence, it must be given before the usual hours of rest on the day following;
3. If sent by mail, it must be deposited in the post-office in time to reach him in usual course on the day following.

§ 175 (§ 104). **Where parties reside in different places.**— Where the person giving and the person to receive notice reside in different places, the notice must be given within the following times:—

1. If sent by mail, it must be deposited in the post-office in time to go by mail the day following the day of dishonor, or if there be no mail at a convenient hour on that day, by the next mail thereafter.

2. If given otherwise than through the post-office, then, within the time that notice would have been received in due course of mail, if it had been deposited in the post-office within the time specified in the last subdivision.

§ 176 (§ 105). **When sender deemed to have given due notice.**— Where notice of dishonor is duly addressed and deposited in the post-office, the sender is deemed to have given due notice, notwithstanding any miscarriage in the mails.

§ 177 (§ 106). **Deposit in post-office; what constitutes.**— Notice is deemed to have been deposited in the post-office when deposited in any branch post-office or in any letter box under the control of the post-office department.

§ 178 (§ 107). **Notice to subsequent party; time of.**— Where a party receives notice of dishonor, he has, after the receipt of such notice, the same time for giving notice to antecedent parties that the holder has after the dishonor.

§ 179 (§ 108). **Where notice must be sent.**— Where a party has added an address to his signature, notice of dishonor must be sent to that address; but if he has not given such address, then the note must be sent as follows:—

1. Either to the post-office nearest to his place of residence, or to the post-office where he is accustomed to receive his letters; or

2. If he live in one place, and have his place of business in another, notice may be sent to either place; or

3. If he is sojourning in another place, notice may be sent to the place where he is so sojourning.

But where the notice is actually received by the party within the time specified in this act, it will be sufficient, though not sent in accordance with the requirements of this section.

§ 180 (§ 109). **Waiver of notice.**— Notice of dishonor may be waived, either before the time of giving notice has arrived, or after the omission to give due notice, and the waiver may be express or implied.

§ 181 (§ 110). **Whom affected by waiver.** — Where the waiver is embodied in the instrument itself, it is binding upon all parties; but where it is written above the signature of an indorser, it binds him only.

§ 182 (§ 111). **Waiver of protest.**— A waiver of protest, whether in the case of a foreign bill of exchange or other negotiable instrument, is deemed to be a waiver not only of a formal protest, but also of presentment and notice of dishonor.

§ 183 (§ 112). **When notice is dispensed with.**— Notice of dishonor is dispensed with when, after the exercise of reasonable diligence, it cannot be given to or does not reach the parties sought to be charged.

§ 184 (§ 113). **Delay in giving notice; how excused.**— Delay in giving notice of dishonor is excused when the delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct or negligence. When the cause of delay ceases to operate, notice must be given with reasonable diligence.

§ 185 (§ 114). **When notice need not be given to drawer.**— Notice of dishonor is not required to be given to the drawer in either of the following cases:—

1. Where the drawer and drawee are the same person;
2. Where the drawee is a fictitious person or a person not having capacity to contract;
3. Where the drawer is the person to whom the instrument is presented for payment;
4. Where the drawer has no right to expect or require that the drawee or acceptor will honor the instrument;
5. Where the drawer has countermanded payment.

§ 186 (§ 115). **When notice need not be given to indorser.**— Notice of dishonor is not required to be given to an indorser in either of the following cases:—

1. Where the drawee is a fictitious person or a person not having capacity to contract, and the indorser was aware of the fact at the time he indorsed the instrument;
2. Where the indorser is a person to whom the instrument is presented for payment;
3. Where the instrument was made or accepted for his accommodation.

§ 187 (§ 116). **Notice of non-payment where acceptance refused.**— Where due notice of dishonor by non-acceptance has been given, notice of a subsequent dishonor by non-payment is not necessary, unless in the meantime the instrument has been accepted.

§ 188 (§ 117). **Effect of omission to give notice of non-acceptance.**— An omission to give notice of dishonor by non-acceptance does not prejudice the rights of a holder in due course subsequent to the omission.

§ 189 (§ 118). **When protest need not be made; when must be made.**— Where any negotiable instrument has been dishonored it may be protested for non-acceptance or non-payment, as the case may be; but protest is not required, except in the case of foreign bills of exchange.

ARTICLE IX.

DISCHARGE OF NEGOTIABLE INSTRUMENTS.

Section 200. Instrument; how discharged.
201. When persons secondarily liable on, discharged.
202. Right of party who discharged instrument.
203. Renunciation by holder.
204. Cancellation; unintentional; burden of proof.
205. Alteration of instrument; effect of.
206. What constitutes a material alteration.

§ 200 (§ 119). **Instrument; how discharged.**— A negotiable instrument is discharged: —

1. By payment in due course by or on behalf of the principal debtor;

2. By payment in due course by the party accommodated, where the instrument is made or accepted for accommodation;

3. By the intentional cancellation thereof by the holder;

4. By any other act which will discharge a simple contract for the payment of money;

5. When the principal debtor becomes the holder of the instrument at or after maturity in his own right.

§ 201 (§ 120). **When persons secondarily liable on, discharged.**— A person secondarily liable on the instrument is discharged :—

1. By any act which discharges the instrument;

2. By the intentional cancellation of his signature by the holder;

3. By the discharge of a prior party;

4. By a valid tender of payment made by a prior party;

5. By a release of the principal debtor, unless the holder's right of recourse against the party secondarily liable is expressly reserved;

6. By any agreement binding upon the holder to extend the time of payment or to postpone the holder's right to enforce the instrument, unless the right of recourse against such party is expressly reserved.

§ 202 (§ 121). **Right of party who discharges instrument.** — Where the instrument is paid by a party secondarily liable thereon, it is not discharged; but the party so paying it is remitted to his former rights as regards all prior parties, and he may strike out his own and all subsequent indorsements, and again negotiate the instrument, except: —

1. Where it is payable to the order of a third person, and has been paid by the drawer; and

2. Where it was made or accepted for accommodation, and has been paid by the party accommodated.

§ 203 (§ 122). **Renunciation by holder.** — The holder may expressly renounce his rights against any party to the instrument, before, at or after its maturity. An absolute and unconditional renunciation of his rights against the principal debtor made at or after the maturity of the instrument, discharges the instrument. But a renunciation does not affect the rights of a holder in due course without notice. A renunciation must be in writing, unless the instrument is delivered up to the person primarily liable thereon.

§ 204 (§ 123). **Cancellation; unintentional; burden of proof.** — A cancellation made unintentionally, or under

a mistake, or without the authority of the holder, is inoperative; but where an instrument or any signature thereon appears to have been canceled, the burden of proof lies on the party who alleges that the cancellation was made unintentionally, or under a mistake, or without authority.

§ 205 (§ 124). **Alteration of instrument; effect of.** — Where a negotiable instrument is materially altered without the assent of all parties liable thereon, it is avoided, except as against a party who has himself made, authorized or assented to the alteration and subsequent indorsers. But when an instrument has been materially altered and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof according to its original tenor.

§ 206 (§ 125). **What constitutes a material alteration.**— Any alteration which changes:—

1. The date;
2. The sum payable, either for principal or interest;
3. The time or place of payment;
4. The number or the relations of the parties;
5. The medium or currency in which payment is to be made.

Or which adds a place of payment where no place of payment is specified, or any other change or addition which alters the effect of the instrument in any respect, is a material alteration.

ARTICLE X.

BILLS OF EXCHANGE; FORM AND INTERPRETATION.

Section 210. Bills of exchange defined.
211. Bill not an assignment of funds in hands of drawee.
212. Bill addressed to more than one drawee.
213. Inland and foreign bills of exchange.
214. When bill may be treated as promissory note.
215. Referee in case of need.

§ 210 (§ 126). **Bill of exchange defined.**— A bill of exchange is an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to order or to bearer.

§ 211 (§ 127). **Bill not an assignment of funds in hands of drawee.**— A bill of itself does not operate as an assignment of the funds in the hands of the drawee available for the payment thereof, and the drawee is not liable on the bill unless and until he accepts the same.

§ 212 (§ 128). **Bill addressed to more than one drawee.**— A bill may be addressed to two or more drawees jointly, whether they are partners or not; but not to two or more drawees in the alternative or in succession.

§ 213 (§ 129). **Inland and foreign bills of exchange.**— An inland bill of exchange is a bill which is, or on its face purports to be, both drawn and payable within this State. Any other bill is a foreign bill. Unless the contrary

appears on the face of the bill, the holder may treat it as an inland bill.

§ 214 (§ 130). **When bill may be treated as promissory note.**— Where in a bill drawer and drawee are the same person, or where the drawee is a fictitious person, or a person not having capacity to contract, the holder may treat the instrument, at his option, either as a bill of exchange or a promissory note.

§ 215 (§ 131). **Referee in case of need.**— The drawer of a bill and any indorser may insert thereon the name of a person to whom the holder may resort in case of need, that is to say, in case the bill is dishonored by non-acceptance or non-payment. Such person is called the referee in case of need. It is in the option of the holder to resort to the referee in case of need or not as he may see fit.

ARTICLE XI.

ACCEPTANCE OF BILLS OF EXCHANGE.

Section 220. Acceptance, how made, et cetera.
221. Holder entitled to acceptance on face of bill.
222. Acceptance by separate instrument.
223. Promise to accept; when equivalent to acceptance.
224. Time allowed drawee to accept.
225. Liability of drawee retaining or destroying bill.
226. Acceptance of incomplete bill.
227. Kinds of acceptances.
228. What constitutes a general acceptance.
229. Qualified acceptance.
230. Rights of parties as to qualified acceptance.

§ 220 (§ 132). **Acceptance; how made, et cetera.**— The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer. The acceptance must be in writing and signed by the drawee. It must not express that the drawee will perform his promise by any other means than the payment of money.

§ 221 (§ 133). **Holder entitled to acceptance on face of bill.**—The holder of a bill presenting the same for acceptance may require that the acceptance be written on the bill and if such request is refused, may treat the bill as dishonored.

§ 222 (§ 134.) **Acceptance by separate instrument.**— Where an acceptance is written on a paper other than the bill itself, it does not bind the acceptor except in favor of a person to whom it is shown and who, on the faith thereof, receives the bill for value.

§ 223 (§ 135). **Promise to accept; when equivalent to acceptance.**— An unconditional promise in writing to accept a bill before it is drawn is deemed an actual acceptance in favor of every person who, upon the faith thereof, receives the bill for value.

§ 224 (§ 136). **Time allowed drawee to accept.**— The drawee is allowed twenty-four hours after presentment in which to decide whether or not he will accept the bill; but the acceptance if given dates as of the day of presentation.

§ 225 (§ 137). **Liability of drawee retaining or destroying bill.**— Where a drawee to whom a bill is delivered for acceptance destroys the same, or refuses within twenty-four hours after such delivery, or within such other period as the holder may allow, to return the bill accepted or non-accepted to the holder, he will be deemed to have accepted the same.

§ 226 (§ 138). **Acceptance of incomplete bill.**— A bill may be accepted before it has been signed by the drawer, or while otherwise incomplete, or when it is overdue, or after it has been dishonored by a previous refusal to accept, or by non-payment. But when a bill payable after sight is dishonored by non-acceptance and the drawee subsequently accepts it, the holder, in the absence of any different agreement, is entitled to have the bill accepted as of the date of the first presentment.

§ 227 (§ 139). **Kinds of acceptances.**— An acceptance is either general or qualified. A general acceptance assents without qualification to the order of the drawer. A qualified acceptance in express terms varies the effect of the bill as drawn.

§ 228 (§ 140). **What constitutes a general acceptance.** — An acceptance to pay at a particular place is a general acceptance unless it expressly states that the bill is to be paid there only and not elsewhere.

§ 229 (§ 141). **Qualified acceptance.**— An acceptance is qualified, which is: —

1. Conditional, that is to say, which makes payment by the acceptor dependent on the fulfillment of a condition therein stated;

2. Partial, that is to say, an acceptance to pay part only of the amount for which the bill is drawn;

3. Local, that is to say, an acceptance to pay part only at a particular place;

4. Qualified as to time;

5. The acceptance of some one or more of the drawees, but not of all.

§ 230 (§ 142). **Rights of parties as to qualified acceptance.**— The holder may refuse to take a qualified acceptance, and if he does not obtain an unqualified acceptance, he may treat the bill as dishonored by non-acceptance. Where a qualified acceptance is taken, the drawer and indorsers are discharged from liability on the bill, unless they have expressly or impliedly authorized the holder to take a qualified acceptance, or subsequently assent thereto. When the drawer or indorser receives notice of a qualified acceptance, he must within a reasonable time express his dissent to the holder, or he will be deemed to have assented thereto.

ARTICLE XII.

PRESENTMENT OF BILLS OF EXCHANGE FOR ACCEPTANCE.

Section 240. When presentment for acceptance must be made.
241. When failure to present releases drawer and indorser.
242. Presentment; how made.
243. On what days presentment may be made.
244. Presentment; where time is insufficient.
245. When presentment is excused.
246. When dishonored by non-acceptance.
247. Duty of holder where bill not accepted.
248. Rights of holder where bill not accepted.

§ 240 (§ 143). **When presentment for acceptance must be made.**— Presentment for acceptance must be made:—

1. Where the bill is payable after sight, or in any other case where presentment for acceptance is necessary in order to fix the maturity of the instrument; or

2. Where the bill expressly stipulates that it shall be presented for acceptance; or

3. Where the bill is drawn payable elsewhere than at the residence or place of business of the drawee.

In no other case is presentment for acceptance necessary in order to render any party to the bill liable.

§ 241 (§ 144). **When failure to present releases drawer and indorser.**— Except as herein otherwise provided, the holder of a bill which is required by the next preceding section to be presented for acceptance must either present it for acceptance or negotiate it within a reasonable time. If he fails to do so, the drawer and all indorsers are discharged.

§ 242 (§ 145). **Presentment; how made.**— Presentment for acceptance must be made by or on behalf of the holder at a reasonable hour, on a business day, and before the bill is overdue, to the drawee or some person authorized to accept or refuse acceptance on his behalf; and

1. Where a bill is addressed to two or more drawees who are not partners, presentment must be made to them all, unless one has authority to accept or refuse acceptance for all, in which case presentment may be made to him only;

2. Where the drawee is dead, presentment may be made to his personal representative;

3. Where the drawee has been adjudged a bankrupt or an insolvent, or has made an assignment for the benefit of creditors, presentment may be made to him or to his trustee or assignee.

§ 243 (§ 146). **On what days presentment may be made.**— A bill may be presented for acceptance on any day on which negotiable instruments may be presented for payment under the provisions of sections one hundred and thirty-two and one hundred and forty-five of this act. When Saturday is not otherwise a holiday, presentment for acceptance may be made before twelve o'clock noon on that day.

§ 244 (§ 147). **Presentment where time is insufficient.**— Where the holder of a bill drawn payable elsewhere than at the place of business or the residence of the drawee has not time, with the exercise of reasonable diligence, to present the bill for acceptance before presenting it for payment on the day that it falls due, the delay caused by presenting the bill for acceptance before presenting it for payment is excused and does not discharge the drawers and indorsers.

§ 245 (§ 148). **Where presentment is excused.**— Presentment for acceptance is excused and a bill may be treated as dishonored by non-acceptance in either of the following cases:—

1. Where the drawee is dead or has absconded, or is a fictitious person, or a person not having capacity to contract by bill;

2. Where after the exercise of reasonable diligence, presentment cannot be made;

3. Where, although presentment has been irregular, acceptance has been refused on some other ground.

§ 246 (§ 149). **When dishonored by non-acceptance.**— A bill is dishonored by non-acceptance:—

1. When it is duly presented for acceptance, and such an acceptance as is prescribed by this act is refused or cannot be obtained; or

2. When presentment for acceptance is excused and the bill is not accepted.

§ 247 (§ 150). **Duty of holder where bill not accepted.**— Where a bill is duly presented for acceptance and is not accepted within the prescribed time, the person presenting it must treat the bill as dishonored by non-acceptance or he loses the right of recourse against the drawer and indorsers.

§ 248 (§ 151). **Rights of holder where bill not accepted.**— When a bill is dishonored by non-acceptance, an immediate right of recourse against the drawers and indorsers accrues to the holder and no presentment for payment is necessary.

ARTICLE XIII.

PROTEST OF BILLS OF EXCHANGE.

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263. Protest; when to be made.
264. Protest; where made.
265. Protest both for non-acceptance and non-payment.
266. Protest before maturity where acceptor insolvent.
267. When protest dispensed with.
268. Protest; where bill is lost, et cetera.

§ 260 (§ 152). **In what cases protest necessary.**— Where a foreign bill appearing on its face to be such is dishonored by non-acceptance, it must be duly protested for non-acceptance, and where such a bill which has not previously been dishonored by non-acceptance is dishonored by non-payment, it must be duly protested for non-payment. If it is not so protested, the drawer and indorsers are discharged. Where a bill does not appear on its face to be a foreign bill, protest thereof in case of dishonor is unnecessary.

§ 261 (§ 153). **Protest; how made.**— The protest must be annexed to the bill, or must contain a copy thereof, and must be under the hand and seal of the notary making it, and must specify:—

1. The time and place of presentment;

2. The fact that presentment was made and the manner thereof;

3. The cause or reason for protesting the bill;

4. The demand made and the answer given, if any, or the fact that the drawee or acceptor could not be found.

§ 262 (§ 154). **Protest; by whom made.**— Protest may be made by: —

1. A notary public; or

2. By any respectable resident of the place where the bill is dishonored, in the presence of two or more credible witnesses.

§ 263 (§ 155). **Protest; when to be made.**— When a bill is protested, such protest must be made on the day of its dishonor, unless delay is excused as herein provided. When a bill has been duly noted, the protest may be subsequently extended as of the date of the noting.

§ 264 (§ 156). **Protest; where made.**— A bill must be protested at the place where it is dishonored, except that when a bill drawn payable at the place of business or residence of some person other than the drawee, has been dishonored by non-acceptance, it must be protested for non-payment at the place where it is expressed to be payable, and no further presentment for payment to, or demand on, the drawee is necessary.

§ 265 (§ 157). **Protest both for non-acceptance and non-payment.**— A bill which has been protested for non-acceptance may be subsequently protested for non-payment.

§ 266 (§ 158). **Protest before maturity where acceptor insolvent.**— Where the acceptor has been adjudged a bankrupt or an insolvent or has made an assignment for the benefit of creditors, before the bill matures, the holder

may cause the bill to be protested for better security against the drawer and indorsers.

§ 267 (§ 159). **When protest dispensed with.**— Protest is dispensed with by any circumstances which would dispense with notice of dishonor. Delay in noting or protesting is excused when delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate, the bill must be noted or protested with reasonable diligence.

§ 268 (§ 160). **Protest where bill is lost, et cetera.**— Where a bill is lost or destroyed or is wrongly detained from the person entitled to hold it, protest may be made on a copy or written particulars thereof.

ARTICLE XIV.

ACCEPTANCE OF BILLS OF EXCHANGE FOR HONOR.

Section 280. When bill may be accepted for honor.
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287. Presentment for payment to acceptor for honor; how made.
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289. Dishonor of bill by acceptor for honor.

§ 280 (§ 161). **When bill may be accepted for honor.**— Where a bill of exchange has been protested for dishonor by non-acceptance or protested for better security and is not overdue, any person not being a party already liable thereon, may, with the consent of the holder, intervene and accept the bill *supra* protest for the honor of any party liable thereon or for the honor of the person for whose account the bill is drawn. The acceptance for honor may be for part only of the sum for which the bill is drawn; and where there has been an acceptance for honor for one party, there may be a further acceptance by a different person for the honor of another party.

§ 281 (§ 162). **Acceptance for honor; how made.**— An acceptance for honor *supra* protest must be in writing and

indicate that it is an acceptance for honor, and must be signed by the acceptor for honor.

§ 282 (§ 163). **When deemed to be an acceptance for honor of the drawer.**— Where an acceptance for honor does not expressly state for whose honor it is made, it is deemed to be an acceptance for the honor of the drawer.

§ 283 (§ 164). **Liability of acceptor for honor.**— The acceptor for honor is liable to the holder and all parties to the bill subsequent to the party for whose honor he has accepted.

§ 284 (§ 164). **Agreement of acceptor for honor.**— The acceptor for honor by such acceptance engages that he will on due presentment pay the bill according to the terms of his acceptance, provided it shall not have been paid by the drawee, and provided also that it shall have been duly presented for payment and protested for non-payment and notice of dishonor given to him.

§ 285 (§ 166). **Maturity of bill payable after sight; accepted for honor.**— Where a bill payable after sight is accepted for honor, its maturity is calculated from the date of the noting for non-acceptance and not from the date of the acceptance for honor.

§ 286 (§ 167). **Protest of bill accepted for honor, et cetera.**— Where a dishonored bill has been accepted for honor *supra* protest or contains a reference in case of need, it must be protested for non-payment before it is presented for payment to the acceptor for honor or referee in case of need.

§ 287 (§ 168). **Presentment for payment to acceptor for honor; how made.**— Presentment for payment to the acceptor for honor must be made as follows: —

1. If it is to be presented in the place where the protest for non-payment was made, it must be presented not later than the day following its maturity;

2. If it is to be presented in some other place than the place where it was protested, then it must be forwarded within the time specified in section one hundred and seventy-five.

§ 288 (§ 169). **When delay in making presentment is excused.**— The provisions of section one hundred and forty-one apply where there is delay in making presentment to the acceptor for honor or referee in case of need.

§ 289 (§ 170). **Dishonor of bill by acceptor for honor.**— When the bill is dishonored by the acceptor for honor it must be protested for non-payment by him.

ARTICLE XV.

PAYMENT OF BILLS OF EXCHANGE FOR HONOR.

Section 300. Who may make payment for honor.
301. Payment for honor; how made.
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303. Preference of parties offering to pay for honor.
304. Effect on subsequent parties where bill is paid for honor.
305. Where holder refuses to receive payment *supra* protest.
306. Rights of payor for honor.

§ 300 (§ 171). **Who may make payment for honor.**— Where a bill has been protested for non-payment, any person may intervene and pay it *supra* protest for the honor of any person liable thereon or for the honor of the person for whose account it was drawn.

§ 301 (§ 172). **Payment for honor; how made.**— The payment for honor *supra* protest, in order to operate as such and not as a mere voluntary payment, must be attested by a notarial act of honor, which may be appended to the protest or form an extension to it.

§ 302 (§ 173). **Declaration before payment for honor.**— The notarial act of honor must be founded on a declaration made by the payor for honor or by his agent in that behalf declaring his intention to pay the bill for honor and for whose honor he pays.

§ 303 (§ 174). **Preference of parties offering to pay for honor.**— Where two or more persons offer to pay a bill for the honor of different parties, the person whose

payment will discharge most parties to the bill is to be given the preference.

§ 304 (§ 175). **Effect on subsequent parties where bill is paid for honor.**— Where a bill has been paid for honor, all parties subsequent to the party for whose honor it is paid are discharged, but the payor for honor is subrogated for, and succeeds to, both the rights and duties of the holder, as regards the party for whose honor he pays and all parties liable to the latter.

§ 305 (§ 176). **Where holder refuses to receive payment supra protest.**— Where the holder of a bill refuses to receive payment *supra* protest, he loses his right of recourse against any party who would have been discharged by such payment.

§ 306 (§ 177). **Rights of payor for honor.**— The payor for honor on paying to the holder the amount of the bill and the notarial expenses incidental to its dishonor, is entitled to receive both the bill itself and the protest.

ARTICLE XVI.

BILLS IN A SET.

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311. Rights of holders where different parts are negotiated.
312. Liability of holder who indorses two or more parts of a set to different persons.
313. Acceptance of bills drawn in sets.
314. Payment by acceptor of bills drawn in sets.
315. Effect of discharging one of a set.

§ 310 (§ 178). **Bills in sets constitute one bill.**— Where a bill is drawn in a set, each part of the set being numbered and containing a reference to the other parts, the whole of the parts constitute one bill.

§ 311 (§ 179). **Rights of holders where different parts are negotiated.**— Where two or more parts of a set are negotiated to different holders in due course, the holder whose title first accrues is as between such holders the true owner of the bill. But nothing in this section affects the rights of a person who in due course accepts or pays the part first presented to him.

§ 312 (§ 180). **Liability of holder who indorses two or more parts of a set to different persons.**— Where the holder of a set indorses two or more parts to different persons he is liable on every such part, and every indorser subsequent to him is liable on the part he has himself indorsed, as if such parts were separate bills.

§ 313 (§ 181). **Acceptance of bills drawn in sets.**— The acceptance may be written on any part and it must be

written on one part only. If the drawee accepts more than one part, and such accepted parts are negotiated to different holders in due course, he is liable on every such part as if it were a separate bill.

§ 314 (§ 182). **Payment by acceptor of bills drawn in sets.**— When the acceptor of a bill drawn in a set pays it without requiring the part bearing his acceptance to be delivered up to him, and that part at maturity is outstanding in the hands of a holder in due course, he is liable to the holder thereon.

§ 315 (§ 183). **Effect of discharging one of a set.**— Except as herein otherwise provided, where any one part of a bill drawn in a set is discharged by payment or otherwise the whole bill is discharged.

ARTICLE XVII.

PROMISSORY NOTES AND CHECKS.

Section 320. Promissory note defined.
321. Check defined.
322. Within what time a check must be presented.
323. Certification of check; effect of.
324. Effect where holder of check procures it to be certified.
325. When check operates as an assignment.

§ 320 (§ 184). **Promissory note defined.**— A negotiable promissory note within the meaning of this act is an unconditional promise in writing made by one person to another signed by the maker engaging to pay on demand or at a fixed or determinable future time, a sum certain in money to order or to bearer. Where a note is drawn to the maker's own order, it is not complete until indorsed by him.

§ 321 (§ 185). **Check defined.**— A check is a bill of exchange drawn on a bank payable on demand. Except as herein otherwise provided, the provisions of this act applicable to a bill of exchange payable on demand apply to a check.

§ 322 (§ 186). **Within what time a check must be presented.**— A check must be presented for payment within a reasonable time after its issue or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay.

§ 323 (§ 187). **Certification of check; effect of.**— Where a check is certified by the bank on which it is drawn the certification is equivalent to an acceptance.

§ 324 (§ 188). **Effect where the holder of check procures it to be certified.**— Where the holder of a check procures it to be accepted or certified the drawer and all indorsers are discharged from liability thereon.

§ 325 (§ 189). **When check operates as an assignment.**— A check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder, unless and until it accepts or certifies the check.

ARTICLE XVIII.

NOTES GIVEN FOR PATENT RIGHTS AND FOR A SPECULATIVE CONSIDERATION.

Section 330. Negotiable instruments given for patent rights.
331. Negotiable instruments given for a speculative consideration.
332. How negotiable bonds are made non-negotiable.

§ 330. **Negotiable instruments given for patent rights.**— A promissory note or other negotiable instrument, the consideration of which consists wholly or partly of the right to make, use or sell any invention claimed or represented by the vendor at the time of sale to be patented, must contain the words "given for a patent right" prominently and legibly written or printed on the face of such note or instrument above the signature thereto; and such note or instrument in the hands of any purchaser or holder is subject to the same defenses as in the hands of the original holder; but this section does not apply to a negotiable instrument given solely for the purchase price or the use of a patented article.

§ 331. **Negotiable instrument for a speculative consideration.** — If the consideration of a promissory note or other negotiable instrument consists in whole or in part of the purchase-price of any farm product, at a price greater by at least four times than the fair market value of the same product at the time, in the locality, or of the membership and rights in an association, company or combination to produce or sell any farm

product at a fictitious rate, or of a contract or bond to purchase or sell any farm product at a price greater by four times than the market value of the same product at the time in the locality, the words, "given for a speculative consideration," or other words clearly showing the nature of the consideration, must be prominently and legibly written or printed on the face of such note or instrument above the signature thereof, and such note or instrument, in the hands of any purchaser or holder, is subject to the same defenses as in the hands of the original owner or holder.

§ 332. **How negotiable bonds are made non-negotiable.**— The owner or holder of any corporate or municipal bond or obligation (except such as are designated to circulate as money, payable to bearer), heretofore or hereafter issued in and payable in this State, but not registered in pursuance of any State law, may make such bond or obligation, or the interest coupon accompanying the same, non-negotiable, by subscribing his name to a statement indorsed thereon, that such bond, obligation or coupon is his property; and thereon the principal sum therein mentioned is payable only to such owner or holder, or his legal representatives or assigns, unless such bond, obligation or coupon be transferred by indorsement in blank, or payable to bearer, or to order, with the addition of the assignor's place of residence.

ARTICLE XIX.

LAWS REPEALED; WHEN TO TAKE EFFECT.

Section 340. Laws repealed.
341. When to take effect.

§ 340. **Laws repealed.** — The laws or parts thereof specified in the schedule hereto annexed are hereby repealed.

§ 341. **When to take effect.** — This chapter shall take effect on the first day of October, eighteen hundred and ninety-seven.

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